TAX DISPUTES & RESOLUTION CENTRE

# BENNETT JONES ON TAX DISPUTES

TAXNET PRO

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# Settlement Conferences in the Tax Court of Canada

*By Chris Marta and Eric Brown*

Settlement conferences have become an increasingly effective tool in settling tax disputes. Some of this success is due to the Tax Court of Canada adopting an increasingly active approach to encouraging settlements.

This is borne out by recent statistics. Although settlement conferences are conducted in private, the Tax Court tracks and periodically makes public the number of cases involving settlement conferences that ultimately settle. In May 2018, the Tax Court reported that of all the cases involving settlement conferences since 2010, 70% of them settled.[1] On a regional basis, this statistic is comprised of a settlement rate of 68% in Toronto, 76% in Vancouver and 91% in Montreal/Quebec.[2]

This article discusses the Tax Court's use of settlement conferences and notes ways in which settlement conference judges might assist the parties in reaching a successful outcome at a settlement conference.

## Encouraging Settlements

Trials are not only expensive for taxpayers – they also consume a significant amount of judicial time and resources. Accordingly, the Tax Court strongly encourages settlements of tax disputes.[3] And while early settlements are favoured, everyone prefers last minute settlements to a missed opportunity to reach a settlement. To help encourage this, the Tax Court has implemented various Rules and Practice Notes.[4]

## Settlement Conferences

One of the tools that the Tax Court may use to encourage settlements is its authority under Rule 126.2 of the *Tax Court of Canada Rules (General Procedure)* to require parties to attend a settlement conference. Rule 126.2 allows the Tax Court, either on its own initiative or at the request of a party, to direct that a settlement conference be held to consider the possibility of settling any or all of the issues in dispute.

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[1] Hon. Robert Hogan, "Negotiating Tax Settlements – Part I" (delivered at the Canadian Tax Foundation Conference: Preventing, Navigating & Resolving Tax Disputes, Montreal, May 24-25, 2018), [unpublished] [*Hogan*].
[2] *Ibid*.
[3] Hon. John Owen, "Judges' Panel," in Report of Proceedings of the Sixty-Eighth Tax Conference, 2016 Conference Report (Toronto: Canadian Tax Foundation, 2017), 3:1-18 [*Owen*].
[4] See, for example, *Tax Court of Canada Rules (General Procedure)*, r. 58 (Determination of Questions of Law, Fact or Mixed Law and Fact), r. 126.2 (Settlement Conference) and r. 147 (Costs – General Principles). See also *Tax Court of Canada Practice Notes*, Nos. 10 and 21.

*Obtaining a Settlement Conference*

There are no requirements for the Tax Court to direct the convening of a settlement conference – it is at the court's discretion. However, settlement conferences are typically ordered by the court only in general procedure appeals and where the trial is expected to last at least two days.[5] In relatively large and complex tax disputes, the court will generally order the parties to attend a settlement conference if they fail to ask for one.[6]

A direction for the parties to attend a settlement conference may be issued by the Tax Court at any time. However, it often arises out of case management, at the behest of the case management judge, and occurs after the discovery process is substantially completed.[7] One of the reasons for this is to allow for the parties to gain a better understanding of each other's case. This is important because if the parties do not understand each other's case, then it is more difficult for the parties to come to a compromise.[8]

Since the settlement conference judge may adjourn a settlement conference and reconvene it at a later date, it is possible for the parties to effectively attend multiple settlement conferences over the course of the litigation process.

*Prior to a Settlement Conference*

If a settlement conference is scheduled, each party is typically required to prepare a settlement brief of no more than ten pages. Each party's settlement brief must contain: (1) an explanation of the party's theory of the case; (2) a statement of the material facts that the party expects to establish at the hearing of the appeal and how they will be established; (3) a statement of the issues to be determined at the hearing; and (4) a statement of the law and authorities that the party will rely on at the hearing of the appeal. The brief is essentially a distillation of the essence of a party's case – it should be clear, concise and to the point.[9] The brief is given both to the opposing party and the Tax Court at least fourteen days before the date of the settlement conference. The requirement for the brief and the fourteen day deadline are generally not waived.[10]

To the extent any expert reports have been prepared, the settlement conference judge may order that those reports be provided to both the Tax Court and opposing party.[11]

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[5] Hon. David Graham, "Settlement Conferences in Tax Litigation" (delivered at The Advocates' Society Tax Litigation Practice Group meeting), Toronto, April 4, 2019), [unpublished] [*Graham*].
[6] *Hogan*, *supra* note 1.
[7] *Ibid*.
[8] *Graham*, *supra* note 5.
[9] Monica Biringer, "Settlement Conferences in Tax Litigation" (delivered at The Advocates' Society Tax Litigation Practice Group meeting), Toronto, April 4, 2019), [unpublished] [*Biringer*].
[10] *Owen*, *supra* note 3.
[11] *Graham*, *supra* note 5.

Parties are also generally required to confirm that a written offer of settlement has been made and that a written reply has been provided.[12] The reply should constitute a separate offer and not simply be a rejection of the initial offer.[13] While the settlement offer must reflect a defensible view of the facts and law,[14] it should also involve a reasonable degree of compromise.[15]

A considerable amount of preparation is required for taxpayers in advance of attending a settlement conference. Taxpayers should be prepared, for example, to speak about the context in which the tax issues arose. They should also understand the monetary consequences of agreeing to certain settlement proposals. And while taxpayers should be prepared to make a deal, they should also be prepared to walk away from the settlement conference if they are not comfortable with the concessions offered by the Crown.[16]

*During a Settlement Conference*

Settlement conferences are typically held at one of the Tax Court's facilities, but are sometimes held at a non-court facility depending on the circumstances.[17]

The Tax Court judges do not follow a standard process while facilitating settlement conferences. Each judge is free to conduct the settlement conference as he or she sees fit.

Parties should be prepared to discuss their view of the facts and relevant law and also be willing to compromise. The willingness to compromise is perhaps the most important condition for parties attending a settlement conference. As stated by the Chief Justice of the Tax Court of Canada at the 2017 Canadian Tax Foundation annual conference:

> Settlement is about compromise. It's about grabbing what you can and getting out with a deal that you know you can live with. So it's important that the client understands that. It's all about compromise. It is an important opportunity for the parties because each sees the other party in the flesh. Each can play to the other party directly in their communications. You can see who is in control of the file. You can watch the parties' reactions when certain ideas are floated. And so you can make your own assessment as to where the soft spots are in the other

[12] *Tax Court of Canada Practice Notes*, No. 21; Hon. Lucie Lamarre, "Judges' Panel," in Report of Proceedings of the Seventieth Tax Conference, 2018 Conference Report (Toronto: Canadian Tax Foundation, 2019), 2:1-25 [*Lamarre*]. As stated by the Associate Chief Justice of the Tax Court, the Hon. Lucie Lamarre: "a judge always has the discretion to agree to do a settlement conference if the parties are requesting it, even though no written offers have been exchanged".
[13] *Graham*, *supra* note 5.
[14] Jurisprudentially, it is well established that the settlement of a tax dispute must be "principled". This means the settlement has to reflect a correct (or, at least a defensible) application of the law to the facts. See *CIBC World Markets Inc. v. The Queen*, 2012 FCA 3 at para 22; *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 (C.A.); and *Cohen v. The Queen*, [1980] C.T.C. 318 (F.C.A.).
[15] See *McKenzie v. The Queen*, 2012 TCC 329 at para 11.
[16] *Biringer*, *supra* note 9.
[17] *Graham*, *supra* note 5.

> side. But you have got to be willing to compromise. If you are not willing to compromise, you're wasting your time, and you're wasting your client's time.[18]

Sometimes, the settlement conference judge will provide his or her opinion on the legal questions at issue and offer views on the relative strengths and weaknesses of each party's case. Some settlement conference judges will even suggest settlement proposals.

The parties are required to be present at all times during a settlement conference and are also required to ensure that a representative with full authority to settle the appeal is present.

Although it goes without saying that the parties should be on their best behaviour, the Tax Court recently implemented a Practice Note addressing, among other things, this very point. According to Practice Note No. 21, the court may award costs against a party where it deems the conduct of that party to have impeded on the efficient functioning of the settlement conference. This might occur, for example, where a party fails to comply with one of the other directives noted in Practice Note No. 21.[19]

*Reasons for a Settlement Conference*

While the ultimate goal of a settlement conference is for the parties to reach an agreement to settle their dispute, there are other reasons why a settlement conference may be beneficial.

For example, a settlement conference may offer the parties an independent view of their case from the presiding judge. This can serve as either validation for a party or a reality check.

A settlement conference can also help to clarify and narrow the issues in dispute. This can lead to a reduction in the number of documents, the number of witnesses and the time required for conducting the trial.

*The Success of Settlement Conferences*

Earlier in this article, there was mention of statistics about the success rate in settlement conferences. However, the consensus among tax practitioners had historically been that settlement conferences were not uniformly popular or successful. As stated by Justice Wyman Webb of the Federal Court of Appeal at the 2012 Canadian Tax Foundation annual conference:

> I do not think that there is any doubt that there are more settlement conferences now than there were before. And I think that there is also a different approach to settlement conferences now than when I was in private practice. When I was in private practice and went to a settlement conference

[18] Hon. Eugene Rossiter, "Judges' Panel," in Report of the Proceedings of the 69th Tax Conference, 2017 Conference Report (Toronto: Canadian Tax Foundation, 2018), 2:1-20.
[19] *Graham*, *supra* note 5.

> before a Tax Court judge, all we did was basically disclose our position while still trying to keep our cards as close to our chest as we could. There were no significant comments from the judge about the case – just a general discussion about other things, and then we left. Now there seems to be much more of a focus on actually trying to settle the case – trying to bring the parties to the table to talk about settlement and see whether we can have an open and frank discussion about the case and perhaps even settle it.[20]

While many factors contribute to a successful outcome at a settlement conference, the judge who presides at the conference is regarded by some tax practitioners as the pivotal factor.

## The Role of the Settlement Conference Judge

### *Choosing the Judge*

It is the Chief Justice of the Tax Court who decides which judge is assigned to a particular settlement conference.[21]

If a case management judge has been assigned to a particular case, then, as a general rule, that case management judge will not be assigned as the settlement conference judge.[22] The only exception to this general rule is when the parties consent in writing to having the case management judge and settlement conference judge be the same.[23] However, once a case management judge acts as the settlement conference judge, that judge might not be permitted by the court to continue acting as the case management judge. One of the reasons for this is because a settlement conference judge becomes privy to the private views expressed by the parties at the settlement conference, and that knowledge may impact the judge's decisions going forward in managing the case.[24]

The judge who presides at the settlement conference is prohibited from presiding at the trial and cannot communicate with the trial judge concerning anything that was said or done at the settlement conference.

While all of the Tax Court judges undergo special training sessions on facilitating settlement conferences, not all are asked by the Chief Justice to participate in settlement conferences.[25] Some judges are more comfortable than others with leading a settlement conference, depending partly on the judge's personality

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[20] Hon. Wyman Webb, "Tax Litigation: Current Topics," in Report of Proceedings of the Sixty-Fourth Tax Conference, 2012 Conference Report (Toronto: Canadian Tax Foundation, 2013), 31:1-20.
[21] Hon. Eugene Rossiter, "Tax Litigation: Current Topics," in Report of Proceedings of the Sixty-Fourth Tax Conference, 2012 Conference Report (Toronto: Canadian Tax Foundation, 2013), 31:1-20 [*Rossiter*].
[22] *Lamarre*, *supra* note 12.
[23] *Ibid*.
[24] *Graham*, *supra* note 5.
[25] *Rossiter*, *supra* note 21.

and the skillsets developed by the judge prior to being appointed to the Tax Court. The Chief Justice takes all of this into consideration when choosing which judge to assign.

*Actively Encouraging Settlements*

Although there exists a broad spectrum of styles amongst the Tax Court judges in facilitating settlement conferences, more and more Tax Court judges appear to be adopting an increasingly active approach to encouraging settlements. This is apparent from both public statements made by some of the judges as well as commentary from the bar.

Two Tax Court judges who have publicly stated that they consider themselves to be proactive settlement conference judges are Justice Robert Hogan and Justice David Graham.[26] At a Canadian Tax Foundation seminar in Montreal last year, Justices Hogan and Graham delivered a presentation on "Negotiating Tax Settlements".[27] This past spring, Justice Graham spoke on a panel moderated by Ed Kroft at an Advocates' Society Tax Litigation Practice Group meeting in Toronto on "Settlement Conferences in Tax Litigation". The commentary in the remainder of this article is principally derived from those two events.

*i) Preparing for a Settlement Conference*

Settlement conference judges may decide to prepare for a settlement conference in the same manner as they prepare for a trial. Generally speaking, this entails reading: (1) the pleadings to identify the issues and the facts that each party must establish to be successful at trial; (2) any motions brought before the court and the material filed with those motions; (3) any orders issued by the court; and (4) any other material filed with the court, including discovery transcripts if they are available.

Prior to receiving the parties' settlement briefs, the settlement conference judge may also research the legal questions at issue if the judge is not already familiar with them. After reading the settlement briefs and any other material accompanying the settlement briefs, the judge will then conduct further legal research if required.

If a tax dispute is largely fact driven, a judge may also prepare his or her own materials for use at the settlement conference.

Most importantly, throughout the preparation process, settlement conference judges may develop a list of the weaknesses in each party's case and think of creative ways for the case to settle.

[26] Hon. Robert Hogan and Hon. David Graham, "Negotiating Tax Settlements – Part I" (delivered at the Canadian Tax Foundation Conference: Preventing, Navigating & Resolving Tax Disputes, Montreal, May 24-25, 2018), [unpublished].
[27] *Ibid*.

*ii) Facilitating a Settlement Conference*

After introductions are made and the settlement conference judge discusses how the settlement conference is to proceed, the judge may then summarize his or her understanding of the facts that are not in dispute and the legal issues. In doing so, the judge may ask the parties for certain clarifications or explanations in order to gain a better understanding of the facts and legal issues.

At this point, most judges separate the parties into different rooms. The reasoning behind this is the concern that if the parties are kept in the same room, neither will feel comfortable with having an open discussion with the judge about the strengths and weaknesses of their case. Such a situation may devolve into a mini trial, which is not the objective of a settlement conference.

Next, the judge will spend time with each party discussing the strengths and weaknesses of their case. This is where judges who have prepared well for the settlement conference really add value to the settlement conference process. This preparation will allow the judge to quickly hone in on the factors that are preventing the parties from settling. The judge may then choose to provide his or her opinion on the relevant legal questions and also his or her view on the difficulties that the party may face in establishing facts that must be proven in order for the party to be successful at trial. In conjunction with doing this, the settlement conference judge may also choose to take an active role in assisting the parties to formulate reasonable settlement offers.

Once consensus is reached on a settlement offer – even if only in principle – the judge will then meet with the other party. But before presenting the offer to the other party, the judge may work through the same process with the other party to develop another settlement offer.

Upon the presentation to each party of the other party's settlement offer (or counter offer), the settlement conference judge may then offer his or her view of the offer. This process may be repeated several times until either a settlement is reached or the judge is convinced that the parties will be unable to reach an agreement on settlement.

While a settlement conference judge may work to help the parties to arrive at a settlement, the judge must also be careful not to force either party into a settlement.

# Cases of Note

## *Lohas Farm Inc. v. R.*, 2019 CarswellNat 4897, 2019 TCC 197 (TCC)

**2016-961(GST)G, 2019 TCC 197, 2019 CCI 197 – D'Auray J. – 19/09/19 – Goods and Services Tax – Input tax credits – Documentation requirements**

The registrant business, incorporated in 2008, was a blueberry farm which focused on the exporting of frozen blueberries.

During periods under appeal, iPhones and iPads were released in Canada before they were released in Hong Kong or in Taiwan. At the request of the former client in Hong Kong, the registrant purchased iPhones in Canada to export to Hong Kong and Taiwan. In order to meet the increased demand, the director of the registrant decided to ask friends and acquaintances to purchase iPhones.

From October 1, 2011 to December 31, 2011, the registrant exported 3,597 iPhones to its client in Hong Kong and reported taxable sales of $0 and claimed Income Tax Credits (ITCs) of $281,557.77. From January 1 to 31, 2012 the registrants exported 151 iPhones to its client in Hong Kong and Taiwan and reported taxable sales of $0 and claimed ITCs of $11,802.43. With respect to the reporting period from March 1 to 31, 2012 the registrant exported 96 iPads to its clients in Hong Kong and Taiwan and reported taxable sales of $0 and claimed ITCs of $7659.54.

The Minister of National Revenue made no adjustments to reported taxable sales but disallowed ITCs of $266,233.71 for the 2011 reporting period $10,542.43 for first part of the 2012 reporting period and $$6,989.99 for second part of the 2012 reporting period. The registrant appealed and the appeal was allowed. The registrant retained the burden of establishing that the Minister's assumption of facts were incorrect. There were three components for an agency relationship to exist: 1) both principal and agents must consent to the relationship 2) agents must have the power to bind and affect principal's legal position and 3) principal must have the ability to exercise control over agents.

There was no dispute for the purposes of the *Excise Tax Act* that principal was entitled to claim ITCs in respect of supplies purchased by its agents on its behalf. The consent element for the agency relationship was satisfied. The registrant could grant authority to the buyers allowing the agent to affect the registrant's legal position.

The registrant maintained a detailed accounting of iPhones transactions and the registrant was not entitled to claim as ITCs $18,642 for the period ending in 2011 since for cash purchases some of entries on cash memos had no names and matching receipts did not indicate the name of the recipient or agent of recipient and therefore ITC regulations were not met. The same applied for the two periods ending in 2012 with the registrant not entitled to claim ITCs of $1090.32 for first period and not entitled to claim $1,623.71 for second period.

## *4092325 Investments Ltd. v. Canada*, 2019 CarswellNat 4390, 2019 FCA 225 (FCA)

**A-304-18, 2019 FCA 225, 2019 CAF 225 – Nadon J.A. (Gleason and Rivoalen JJ.A. concurring) – 19/09/03 Income tax – Administration and enforcement – Practice and procedure on appeals**

The taxpayer's case was one of many similar appeals on issues including deduction of losses arising from foreign currency trading transactions and deduction of bad debts. Appeals were subject to case management and representative cases were selected for hearing. The case management judge found that in light of the complexity and intricacy of appeals the lead cases rule under s. 146.1(2) of Tax Court of Canada Rules (General Procedure) was not appropriate.

The case management judge issued an interim order providing that certain appeals would be heard together or one immediately after other by the same judge. The taxpayer appealed and the appeal was dismissed. The Tax Court judge, in capacity of case management judge, did not make a palpable and overriding error in preferring to advance appeals to trial by way of R. 26 of the Rules rather than by way of R. 146.1 of Rules. Even if the Tax Court judge erred in interpreting R. 146.1 of Rules, he did not err in the exercise of discretion. Choosing R. 26 of the Rules rather than R. 146 of the Rules was an option open to the Tax Court judge under the Rules. His choice was not one which justified appellate intervention and such the conclusion should not be taken as an endorsement of the Tax Court Judge's understanding of R. 146.1 of the Rules and of whether the Crown needed to consent to being bound by the result of lead case(s).

## *Silver Wheaton Corp. v. The Queen*, 2019 CarswellNat 4388, 2019 TCC 170 (TCC)

**2016-77(IT)G, 2019 TCC 170, 2019 CCI 170 – D'Arcy J. – 19/08/19 – Income tax – Administration and enforcement – Jurisdiction of Tax Court of Canada -- Practice and procedure on appeals – Costs**

In January 2016 a corporate taxpayer filed an appeal from reassessments issued by the Minister of National Revenue relating to transfer price adjustments under s. 247 of the *Income Tax Act* for the 2005 to 2010 taxation years. The amounts at issue exceeded $280 million. During the course of the appeal the parties carried out numerous litigation steps including providing lists of documents and conducting discovery of the other party's nominees.

Prior to completion of discovery the parties entered into Minutes of Settlement. All documents filed with the Tax Court of Canada in appeal, except for Notice of Appeal, Reply to Notice of Appeal and Answer were subject to sealing order issued by the case management judge. In December 2015, the representative plaintiffs (non-parties) filed a federal securities class action in the United States District Court, Central District of California (U.S. class action). In the U.S. class action, non-parties argued that they suffered injury as a result of a drop-in share price caused by the taxpayer's alleged failure to report on a timely basis.

Non-parties brought order declaration that implied undertaking of confidentiality did not apply. The non-parties were granted leave to file motion. Only the Tax Court of Canada can waive implied undertaking of

confidentiality with respect to discovery in a Tax Court Appeal. This fact combined with the Court's inherent jurisdiction resulted in the Court having jurisdiction to grant relief sought by non-parties. The non-parties had standing to bring motion. Implied undertaking of confidentiality applied to the taxpayer's own discovery.

Rule was that neither documentary nor oral information obtained on discovery was to be used for any purpose other than securing justice in civil proceedings in which answers were compelled. The rule existed to facilitate full disclosure during discovery and to provide measure of protection for privacy interests of examinee. The non-parties and the Crown adopted a narrow reading of the Supreme Court of Canada's description of implied undertaking of confidentiality. The taxpayer was not consenting to voluntary disclosure of testimony of its nominee which implied undertaking of confidentiality would not be waived or otherwise modified.

Non-parties bore burden of demonstrating that implied undertaking of confidentiality should be waived. The parties were not the same in the Tax Court Appeal and U.S. class action, there were no similarities between class of litigants in the U.S. class action and the Crown. The issues were not the same or similar and the non-parties' motion was a fishing expedition. The taxpayer was awarded its costs, with 70 percent payable by non-parties and 30 percent payable by Crown.

### ***R. v. Millar* (BCCA)**

**CA44275, 2019 BCCA 298 – Fitch J.A. (Willcock and Abrioux JJ.A. concurring) – 19/08/19 – Income tax – Administration and enforcement – Offences – Tax evasion – Goods and Services Tax – Administration and enforcement – Offences – Evasion of GST – Criminal law – Charter of Rights and Freedoms – Right to be tried within reasonable time [s. 11(b)] – Pre-trial delay**

The accused was an educator with P Group and taught students how to structure affairs to be exempt from paying income tax. The trial judge dismissed the accused's application for unreasonable delay under s. 11(b) of the *Canadian Charter of Rights and Freedoms*. All but three months of total delay occurred prior to the release of the Supreme Court of Canada (SCC) judgment in J order. The judge convicted the accused of filing false income tax returns, evading income tax, failing to pay GST, and counseling fraud.

The accused appealed and the appeal was dismissed and there was no merit in the accused's jurisdictional arguments. The arguments included that he was exempt from obligation to pay income tax or remit GST by virtue of acting in a private capacity of a natural person, that the CRA lacked authority to investigate, that the Crown lacked authority to prosecute, and that the *Income Tax Act* and the *Criminal Code* intruded on provincial matters.

A form of indictment was not insufficient and use of upper or lower case letters did not make any difference. There was no merit to the grounds that the judge displayed any reasonable apprehension of bias, the judge did not abuse authority by directing the sheriff to take the accused into custody after the accused repeatedly interrupted the judge even after warnings. The judge's interventions in the accused's cross-examinations of the CRA investigator were not improper and it was open to the judge to find that elements of each offence

had been established. The accused did not call into question the propriety of the judge's factual findings or legal analysis underlying convictions.

The judge's analysis of unreasonable delay reflected error in principle in treatment of the case complexity as exceptional circumstance in application of transitional exceptional circumstance, and in assessment of case complexity. Proper application of delay of framework would have led to the same result for different reasons. The total delay from swearing of information to convictions was 56 months, with the net delay of 46 months after deducting the delay attributable to the accused. The fourteen-month period between the date when the summons would have been served until the date of the accused's arrest would be deducted as discrete exceptional event. The crown showed that it placed reasonable reliance on state of law prior to J decision. Delay after the J decision was three months, so the crown had virtually no time to adapt to the decision.

The application of transitional exceptional circumstance led to conclusion that delay was not unreasonable and the accused's new evidence about additional delay between convictions and sentence was not admitted. The admission of this evidence could not have affected resolution of unreasonable delay application.

***Canada (National Revenue) v. Montana*, 2019 FC 900, 2019 CF 900, 2019 D.T.C. 5107 (FC)**

**Income tax — Administration and enforcement — Audits — Requirement to provide documents or information**

The Minister of National Revenue began audit proceedings of the taxpayer and a compliance order was issued regarding documents. The order was not followed, and the taxpayer was found to be in contempt and sentenced. The Minister brought motion to amend compliance order to add provision that the documents would be delivered to the Minister rather than expected at the premises of the taxpayer.

The motion was granted. The wording of subsection 231.7(1) of the *Income Tax Act* speaks of a judge being able to order a person to provide any access, assistance, information or document sought by the Minister in exercising her audit powers. If it were only "access" that must be provided, Parliament would not have added "assistance, information or document". Circumstances were not ordinary as since the Canada Revenue Agency (CRA) first attempted to commence audits, taxpayers were found not to be in compliance with the Act.

The Minister is entitled to determine "scope and manner" of audit and preparing and planning how the audit will be conducted falls squarely within that arena. The taxpayer's tax history weighed heavily in favour of the CRA as the Minister had been unsuccessful in all attempts to even commence audits and had no choice but to seek and obtain three orders. The Minister's good faith attempts to undertake audit had been stymied.

## *Canadian Western Trust Company as Trustee of the Fareed Ahamed TFSA v. The Queen*, 2019 CarswellNat 2253, 2019 TCC 121, 2019 D.T.C. 1085 (TCC [General Procedure])

**2015-4080(IT)G, 2019 TCC 121, 2019 CCI 121 -- Pizzitelli J. -- 19/05/24 -- Income tax -- Administration and enforcement -- Practice and procedure on appeals – Discovery**

The Minister reassessed the taxpayer, a trust governed by Tax Free Savings Account (TFSA), including amounts in income on basis that the nature of its securities trading showed that it was carrying on business so as to be caught by exception to exemption from tax in s. 146.2(6) of the *Income Tax Act.*

The taxpayer appealed. In the discovery process, the taxpayer unsuccessfully requested copies of documents in public domain including information bulletins, press releases, and technical interpretations and for unredacted internal finance documents of which the taxpayer had obtained redacted versions under the *Access to Information Act* (ATIA). The Minister also refused to answer the taxpayer's questions about draft statement of agreed facts, about policy and purpose of provisions of the Act, about the Department of Finance policy on TFSAs and about whether the redacted documents were made in usual and ordinary course of business.

The taxpayer brought motion to compel the Minister to produce documents and to answer questions. The motion was dismissed. The taxpayer's request for publicly available documents was improper as there was no evidence that the Minister relied on any of these documents, they could be obtained them on their own, and it was almost abusive to expect the Minister to undertake the taxpayer's research for it. Redacted documents were not prepared or considered during audit or reassessment and the taxpayer could seek remedies under the ATIA and it was not within the Minister's jurisdiction to overrule redactions by the Department of Finance. Statutory interpretation of s. 146.2(6) of the Act was a question of law on which redacted documents had very little or no relevance. The process of agreeing to any Agreed Statement of Fact was confidential and without prejudice. It was improper to ask the Minister if she disputed any of the facts set out in the draft instead of following proper process in seeking admissions. Questions about policy or purpose of statutory provisions and about the Department of Finance policy on taxability of TFSAs were improper as they invited legal argument or disclosure of evidence. Internal working papers of finance employees were irrelevant to the determination of the question of law. Questions about authenticity of documents were irrelevant and were improper attempts to admit draft versions of policy statements to undercut the Minister's final version. There was little or no merit to any of the taxpayer's arguments so the Minister was awarded costs in any event of cause.

## Appeals Tables

### 1. — Applications for Leave to Appeal Filed With Supreme Court of Canada

Current as at October 11, 2019 Supreme Court of Canada *Bulletin of Proceedings*

Applications for Leave to Appeal from income tax decisions of the Federal Court of Appeal and provincial Appeal Courts filed with the Supreme Court of Canada are listed alphabetically below.

| Style of Cause | Citation | Date Filed | SCC File(s) |
|---|---|---|---|
| *Ark Angel Foundation v. Canada (National Revenue)* | [2019] 4 C.T.C. 71 (FCA) | April 1, 2019 | 38579 |
| *Birchcliff Energy Ltd. v. R.* | 2019 CarswellNat 2047 (FCA) | August 14, 2019 | 38761 |
| *Gratl v. R.* | 2019 CarswellNat 25 (FCA) | March 6, 2019 | 38768 |
| *Van Steenis v. R.* | 2019 CarswellNat 1487 (FCA) | July 29, 2019 | 38762 |

### 2. — Leave to Appeal to Supreme Court of Canada Granted

Current as at October 11, 2019 Supreme Court of Canada *Bulletin of Proceedings*

| Style of Cause | Citation | Date Granted | SCC File(s) | Status |
|---|---|---|---|---|
| *British Columbia Investment Management Corp., Canada (Attorney General) v.* | 2018 CarswellBC 227 (BC CA) | October 11, 2018 | 38059 | Appeal heard (judgment reserved), May 13, 2019 |
| *MacDonald v. R.* | [2019] 3 C.T.C. 79 (FCA) | March 21, 2019 | 38320 | Appeal heard (judgment reserved), Oct. 17, 2019 |

### 3. — Leave to Appeal to Supreme Court of Canada Refused (2016 to Present)

Current as at October 11, 2019 Supreme Court of Canada *Bulletin of Proceedings*

| Style of Cause | Citation | Date Refused |
|---|---|---|
| *Abdalla v. R.* | 2019 CarswellNat 18 (FCA) | June 13, 2019 |
| *Aeronautic Development Corp. v. Canada* | [2018] 6 C.T.C. 159 (FCA) | March 7, 2019 |
| *Anderson v. Benson Trithardt Noren LLP* | [2017] 2 C.T.C. 81 (Sask. CA) | February 23, 2017 |
| *Barejo Holdings ULC v. R.* | [2017] 1 C.T.C. 181 (FCA) | June 22, 2017 |
| *Beima v. M.N.R.* | 2017 CarswellNat 1805 (FCA) | January 10, 2019 |

## 3.1 — Leave to Appeal to Supreme Court of Canada Refused (2016 to Present)

| Style of Cause | Citation | Date Refused |
|---|---|---|
| *Bell v. R.* | 2018 CarswellNat 2149 (FCA) | February 14, 2019 |
| *Bloom v. R.* | [2010] 5 C.T.C. 143 (FC) | June 8, 2017 |
| *Brassard v. R.* | 2017 CarswellNat 5446 (FCA) | December 20, 2018 |
| *Canada Life Insurance Company of Canada v. Canada (Attorney General)* | [2018] 6 C.T.C. 126 (Ont. CA) | March 7, 2019 |
| *Castro v. R.* | [2016] 1 C.T.C. 245 (FCA) | April 14, 2016 |
| *Chriss v. R.* | [2017] 1 C.T.C. 107 (FCA) | March 30, 2017 |
| *Deschênes v. R.* | 2015 CarswellNat 5535 (FCA) | February 18, 2016 |
| *Dieckmann v. R.* | 2017 CarswellOnt 10128 (Ont. CA) | March 15, 2018 |
| *Dove v. R.* | 2016 CarswellNat 4557 (FCA) | June 1, 2017 |
| *Éléments chauffants Tempora inc. v. R.* | 2018 CarswellQue 7914 (Que. CA) | March 7, 2019 |
| *ENMAX Energy Corp. v. Alberta* | [2018] 5 C.T.C. 35 (Alta. CA) | February 28, 2019 |
| *Fiducie financière Satoma v. Canada* | [2019] 2 C.T.C. 33 (FCA) | March 28, 2019 |
| *Forsythe [Zoccole] v. R.* | 2015 CarswellNat 6396 (FCA) | April 21, 2016 |
| *Gagné v. R.* | 2017 CarswellQue 3160 (Que. CA) | January 11, 2018 |
| *Genetec inc. v. Agence du revenu du Québec* | 2018 CarswellQue 3578 (Que. CA) | June 20, 2019 |
| *Grenier v. Canada (Attorney General)* | 2015 CarswellNat 7146 (FCA) | June 2, 2016 |
| *Grenier v. R.* | 2016 CarswellNat 6183 (FCA) | January 18, 2018 |
| *Grenon v. Canada Revenue Agency* | 2017 CarswellAlta 493 (Alta. CA) | September 21, 2017 |
| *Grenon v. R.* | [2016] 4 C.T.C. 72 (FCA) | June 30, 2016 |
| *Guarantee Company of North America v. Manitoba Housing and Renewal Corp. et al.* | [2018] 4 C.T.C. 105 (Man. CA) | January 17, 2019 |
| *Gunner Industries Ltd. v. R.* | [2016] 2 C.T.C. 110 (Sask. QB)<br>(Sask. CA unreported) | March 14, 2019 |
| *Holterman v. Fish* | [2018] 3 C.T.C. 55 (Ont. CA) | July 5, 2018 |
| *Humane Society of Canada v. M.N.R.* | 2015 CarswellNat 3605 (FCA) | March 10, 2016 |
| *Humby v. R.* | [2016] 3 C.T.C. 159 (FCA) | April 20, 2017 |

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|---|---|---|
| *Iggillis Holdings Inc., Canada (M.N.R.) v.* | [2018] 4 C.T.C. 1 (FCA) | October 25, 2018 |
| *Jaamiah Al Uloom Al Islamiyyah Ontario v. M.N.R.* | 2016 CarswellNat 290 (FCA) | July 28, 2016 |

## 3.2 — Leave to Appeal to Supreme Court of Canada Refused (2016 to Present)

| Style of Cause | Citation | Date Refused |
|---|---|---|
| *Karam v. Canada (Attorney General)* | 2016 CarswellNat 884 (FCA) | September 8, 2016 |
| *Keay v. R.* | 2016 CarswellNat 5816 (FCA) | May 18, 2017 |
| *Laplante v. R.* | 2018 CarswellNat 5955 (FCA) | May 2, 2019 |
| *Mac's Convenience Stores Inc. v. Canada (Attorney General)* | [2015] 4 C.T.C. 93 (Que. CA) | March 3, 2017 |
| *Madison Pacific Properties Inc. v. Canada* | 2019 CarswellNat 187 (FCA) | July 11, 2019 |
| *Martin (L.) v. R.* | 2015 CarswellNat 4557 (FCA) | April 21, 2016 |
| *Mason v. R.* | 2016 CarswellNat 77 (FCA) | June 30, 2016 |
| *Montana v. Canada (National Revenue)* | 2017 CarswellNat 4882 (FCA) | June 28, 2018 |
| *Morrissey v. Canada (Attorney General)* | 2019 CarswellNat 856 (FCA) | September 26, 2019 |
| *Muller v. M.N.R.* | 2016 CarswellNat 5277 (FCA) | April 6, 2017 |
| *Orsini v. Canada (Revenue Agency)* | 2016 CarswellQue 8998 (Que. CA) | March 30, 2017 |
| *Oxford Properties Group Inc. v. R.* | [2018] 6 C.T.C. 1 (FCA) | December 13, 2018 |
| *Pellan v. Québec (Agence du revenu)* | 2016 CarswellQue 673 (Que. CA) | December 22, 2016 |
| *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.* | [2018] 6 C.T.C. 36 (Ont. CA) | April 25, 2019 |
| *Rice v. Canada (Attorney General)* | 2016 CarswellQue 4896 (Que. C.A.) | December 22, 2016 |
| *Rio Tinto Alcan Inc., Canada v.* | [2019] 3 C.T.C. 18 (FCA) | March 21, 2019 |
| *Rona Inc. v. Canada (National Revenue)* | 2017 CarswellNat 2588 (FCA) | February 1, 2018 |
| *Samaroo v. Canada Revenue Agency* | 2019 CarswellBC 778 (BC CA) | October 10, 2019 |
| *Segura Mosquera v. R.* | 2018 CarswellNat 5272 (FCA) | June 20, 2019 |
| *Truong v. R.* | 2018 CarswellNat 28 (FCA) | October 18, 2018 |
| *University Hill Holdings Inc. (Formerly 589918 B.C. Ltd.) v. Canada* | [2018] 3 C.T.C. 63 (FCA) | August 30, 2018 |

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|---|---|---|
| *Veracity Capital Corp., R. v.* | [2017] 3 C.T.C. 104 (BC CA) | June 8, 2017 |
| *Watts v. R.* | 2018 CarswellOnt 2105 (Ont. CA) | September 27, 2018 |
| *594710 British Columbia Ltd. v. R.* | 2018 CarswellNat 5237 (FCA) | February 21, 2019 |
| *1455257 Ontario Inc. v. R.* | 2016 CarswellNat 869 (FCA) | September 8, 2016 |

## 4. — Notices of Appeal to Federal Court of Appeal Filed

Current as at October 17, 2019

**Federal income tax cases** appealed to the Federal Court of Appeal from decisions reported October 17, 2019, but not yet heard or discontinued, are listed alphabetically below. Verification of the current status of an appeal may be obtained by calling the FCA Registry at (613) 996-6795 or at http://apps.fca-caf.gc.ca/pq/IndexingQueries/infp_queries_e.php.

| Style of Cause | Citation | Date Filed | FCA File(s) |
|---|---|---|---|
| *AE Hospitality Ltd. v. M.N.R.* | 2019 CarswellNat 2079 (TCC) | July 2019 | A-268-19, A-269-19 |
| *Al Saunders Contracting & Consulting Inc. v. M.N.R.* | [2019] 6 C.T.C. 2028 (TCC) | May 2019 | A-191-19, A-192-19 |
| *Alta Energy Luxembourg S.A.R.L. v. R.* | [2019] 5 C.T.C. 2183 (TCC) | October 2018 | A-315-18 (to be heard Nov12, 2019 |
| *Aquilini (Estate) v. R.* | 2019 CarswellNat 2558 (TCC) | September 2019 | A-313-19 to A-317-19 |
| *Asbfroushani v. Beach Place Ventures Ltd.* | 2019 CarswellNat 219 (TCC) | March 2019 | A-128-19 |
| *Atlantic Packaging Products Ltd. Atlantic Produits D'Emballage Ltée v. R.* | [2019] 3 C.T.C. 2121 (TCC) | October 2018 | A-328-18 |
| *Atlas Tube Canada ULC v. M.N.R.* | [2019] 4 C.T.C. 123 (FC) | December 2018 | A-396-18 (motion to intervene granted 2019 FCA 120) |
| *BCS Group Business Services Inc. v. R.* | 2018 CarswellNat 3418 (TCC) | July 2018 | A-204-18 |
| *Bank of Montreal, The v. R.* | [2019] 5 C.T.C. 2074 (TCC) | October 2018 | A-337-18 |
| *Barejo Holdings ULC v. R.* | 2018 CarswellNat 5674 TCC) | October 2018 | A-335-18 (to be heard Nov 13, 2019) |
| *Barrs v. R.* | 2019 CarswellNat 3718 (FC) | September 2019 | A-310-19, A-359-19 |
| *Beima v. M.N.R.* | 2018 CarswellNat 1142 (FC) | March 2018 | A-87-18 (to be heard Nov 7,2019) |
| *Boguski v. M.N.R.* | 2018 CarswellNat 8094 (TCC) | December 2018 | A-392-18 |

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|---|---|---|---|
| *Bradshaw v. R.* | 2018 CarswellNat 7707 (TCC) | November 2018 | A-364-18 |
| *Bradwick Property Management Services Inc. v. Canada (National Revenue)* | 2019 CarswellNat 638 (FC) | April 2019 | A-146-19 |
| *Brooks v. R.* | 2019 CarswellNat 604 (TCC) | March 2019 | A-115-19 (to be heard Nov 21, 2019) |
| *CBS Canada Holdings Co. v. R.* | [2019] 3 C.T.C. 2132 (TCC) | October 2018 | A-333-18 (judgment reserved Sept. 17, 2019) |
| *Cameco Corp. v. R.* | [2019] 1 C.T.C. 2001 (TCC) | October 2018 | A-349-18 |
| *Cameco Corp. v. R.* | 2019 CarswellNat 1484 (TCC) | May 2019 | A-193-19 |

## 4.1 — Notices of Appeal to Federal Court of Appeal Filed

| Style of Cause | Citation | Date Filed | FCA File(s) |
|---|---|---|---|
| *Canadian Western Trust Company as Trustee of the Fareed Ahamed TFSA v. R.* | 2019 CarswellNat 2253 (TCC) | June 2019 | A-206-19 |
| *Cassan v. R.* | [2018] 1 C.T.C. 2001 (TCC) | October 2017 | A-302-17 to A-307-17 |
| *Catlos v. R.* | [2018] 6 C.T.C. 2149 (TCC) | September 2018 | A-295-18 to A-297-18 |
| *Chibani v. R.* | 2019 CarswellNat 2251 (TCC) | July 2019 | A-278-19 |
| *Colitto v. R.* | [2019] 5 C.T.C. 2001 (TCC) | May 2019 | A-188-19 |
| *De Geest v. R.* | 2019 CarswellNat 279 (TCC) | March 2019 | A-101-19 |
| *Deans Knight Income Corp. v. R.* | [2019] 4 C.T.C. 2001 (TCC) | May 2019 | A-170-19 |
| *Deegan v. Canada (Attorney General)* | 2019 CarswellNat 3474 (TCC) | September 2019 | A-370-19 |
| *Deshaies v. Canada (National Revenue)* | 2018 CarswellNat 4656 (TCC) | September 2018 | A-287-18 |
| *European Staffing Inc. v. M.N.R.* | 2019 CarswellNat 708 (TCC) | April 2019 | A-144-19 |
| *Eyeball Networks Inc. v. R.* | 2019 CarswellNat 3504 (TCC) | September 2019 | A-308-19 |
| *Garbutt v. R.* | [2017] 2 C.T.C. 159 (TCC) | December 2016 | A-450-16 |
| *Gladwin Realty Corp. v. R.* | 2019 CarswellNat 752 (TCC) | April 2019 | A-138-19 |
| *Gordon v. R.* | 2019 CarswellNat 3036 (FC) | October 2019 | A-394-19 |
| *Hunt v. R.* | 2018 CarswellNat 5373 (TCC) | October 2018 | A-327-18 |
| *Iberville Developments Ltd. v. R.* | [2019] 2 C.T.C. 2109 (TCC) | June 2018 | A-192-18 |

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|---|---|---|---|
| *Jefferson v. R.* | [2019] 4 C.T.C. 2125 (TCC) | May 2019 | A-190-19 |
| *Jewett v. Canada (Attorney General)* | 2019 CarswellNat 376 (FC) | March 2019 | A-124-19 |
| *Johnson v. M.N.R.* | 2018 CarswellNat 5996 (TCC) | November 2018 | A-363-18 |
| *Keybrand Foods Inc. v. R.* | 2019 CarswellNat 3819 (TCC) | September 2019 | A-354-19 |
| *King v. R.* | [2019] 4 C.T.C. 2091 (TCC) | January 2019 | A-56-19 |
| *Laliberté v. R.* | [2019] 6 C.T.C. 2040 (TCC) | October 2018 | A-334-18 |
| *Landbouwbedrijf Backx B.V. v. R.* | [2019] 3 C.T.C. 2177 (TCC) | September 2018 | A-298-18 (to be heard Oct 30, 2019) |
| *Lawyers' Professional Indemnity Company v. R.* | [2019] 4 C.T.C. 2038 (TCC) | October 2018 | A-348-18 |
| *Le Bouthillier v. R.* | 2019 CarswellNat 4366 (TCC) | September 2019 | A-345-19 |

## 4.2 — Notices of Appeal to Federal Court of Appeal Filed

| Style of Cause | Citation | Date Filed | FCA File(s) |
|---|---|---|---|
| *Lewin Estate v. R.* | 2019 CarswellNat 221 (TCC) | February 2019 | A-95-19 |
| *Liu v. R.* | [2017] 6 C.T.C. 2193 (TCC) | September 2017 | A-278-17 |
| *Loblaw Financial Holdings Inc. v. R.* | [2019] 2 C.T.C. 2001 (TCC) | October 2018 | A-321-18 |
| *MacDonald v. R.* | 2018 CarswellNat 1076 (TCC) | April 2018 | A-118-18 |
| *Markou v. R.* | 2018 CarswellNat 1459 (TCC) | May 2018 | A-132-18 to A-135-18 (judgment reserved Oct. 17, 2019) |
| *McCartie v. R.* | 2018 CarswellNat 5271 (TCC) | October 2018 | A-317-18 |
| *Moose Factory Restaurant Properties Ltd. v. R.* | 2019 CarswellNat 3715 (TCC) | August 2019 | A-297-19 |
| *Morrison v. R.* | 2018 CarswellNat 6307 (TCC) | December 2018 | A-398-18, A-404-18 |
| *Mottle v. R.* | [2019] 1 C.T.C. 2324 (TCC) | September 2018 | A-284-18 |
| *Nagel v. R.* | 2018 CarswellNat 458 (TCC) | March 2018 | A-90-18 |
| *Pangaea One Acquisition Holdings XII S.À.R.L. v. R.* | [2019] 3 C.T.C. 2095 (TCC) | September 2018 | A-272-18 |
| *Prince v. Canada (National Revenue)* | 2019 CarswellNat 801 (FC) | April 2019 | A-156-19 |
| *Ray-Mont Logistiques Montréal Inc. v. M.N.R.* | 2019 CarswellNat 3255 (TCC) | July 2019 | A-277-19 |

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|---|---|---|---|
| *Roher v. R.* | 2019 CarswellNat 137 (TCC) | February 2019 | A-73-19 |
| *Roofmart Ontario Inc. v. M.N.R.* | 2019 CarswellNat 1596 (FC) | May 2019 | A-184-19 |
| *Royal City Taxi Ltd. v. M.N.R.* | 2019 CarswellNat 1672 (TCC) | June 2019 | A-203-19 |
| *SPE Valeur Assurable Inc. v. R.* | 2019 CarswellNat 4364 (TCC) | October 2019 | A-391-19 |
| *Savics v. R.* | 2019 CarswellNat 991 (TCC) | May 2019 | A-167-19 |
| *Silver Wheaton Corp. v. R.* | 2019 CarswellNat 4388 (TCC) | August 2019 | A-304-19, A-305-19 |
| *Simard v. R.* | 2018 CarswellNat 7805 (TCC) | December 2018, January 2019 | A-399-18 to A-403-18, A-4-19 to A-8-19 |
| *Tedford MacIntosh v. R.* | 2019 CarswellNat 3576 (TCC) | September 2019 | A-346-19 |
| *van der Steen v. R.* | 2019 CarswellNat 158 (TCC) | February 2019 | A-84-19 |
| *Venti v. M.N.R.* | 2019 CarswellNat 3256 (TCC) | September 2019 | A-344-19 |
| *Wall v. R.* | 2019 CarswellNat 4169 (TCC) | September 2019 | A-319-19 |

## 4.3 — Notices of Appeal to Federal Court of Appeal Filed

| Style of Cause | Citation | Date Filed | FCA File(s) |
|---|---|---|---|
| *Beverly Telford v. M.N.R.* | | April 2018 | A-129-18 (to be heard Nov 14, 2019 |
| *Church of Atheism of Central Canada v M.N.R.* | | February 2019 | A-85-19 (to be heard Nov 12, 2019) |
| *Patterson Dental Canada Inc. v R.* | 2018 CarswellNat 3674 | August 2018 | A-251-18 (to be heard Nov 5, 2019) |
| *Weinberg Family Trust v. R.* | 2016 CarswellNat 308 (TCC) | February 2016 | A-59-16 |
| *Xia v. R.* | 2018 CarswellNat 8942 (TCC) | December 2018 | A-423-18 |
| *Yellow Point Lodge Ltd. v. R.* | 2019 CarswellNat 4368 (TCC) | September 2019 | A-377-19 |
| *626468 New Brunswick Inc. v. R.* | [2018] 6 C.T.C. 2139 (TCC) | June 2018 | A-187-18 (to be heard Oct 30, 2019) |
| *984274 Alberta Inc. v. R.* | 2019 CarswellNat 1306 (TCC) | May 2019 | A-186-19 |
| *1717398 Ontario Inc. (Lost Forest Park) v. R.* | 2019 CarswellNat 4746 (TCC) | September 2019 | A-362-19 |
| *2078970 Ontario Inc. v. 2078702 Ontario Inc.* | [2019] 3 C.T.C. 2047 (TCC) | July 2018 | A-234-18, A-235-18 |
| *6075240 Canada Inc. v. M.N.R.* | 2019 CarswellNat 1994 (FC) | June 2019 | A-208-19 |
| *9178-3472 Québec Inc. v. M.N.R.* | 2019 CarswellNat 95 (TCC) | February 2019 | A-72-19 |

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