Docket: 2012-1452(IT)G

BETWEEN:

FIO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 25, 2013 at Toronto, Ontario.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	A. Christina Tari Jason A. Puterman
Counsel for the Respondent:	Wendy Linden Eleanor H. Thorn Elizabeth Chasson

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ORDER

Upon hearing from the parties;

In accordance with the attached Reasons for Order:

a) The Court orders the Respondent not to use any documents obtained by the Respondent in the course of the discovery relating to the Appellant's appeal instituted on April 12, 2012 in any other proceeding before this Court or any other court. The Court's order does not apply to any

documents that the Canada Revenue Agency obtained prior to the date the Appellant instituted its appeal.

b) Costs are awarded to the Appellant in the amount of $25,000.

c) The Respondent shall have 30 days to file an application with the Court for leave to use the relevant documents in another proceeding.

Signed at Ottawa, Canada, this 20th day of February 2014.

"J. D'Arcy"

D'Arcy J.

Citation: 2014 TCC 58
Date: 20140220
Docket: 2012-1452(IT)G

BETWEEN:

FIO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Arcy J.

[1] The Appellant has brought a motion for an order of this Court vacating the October 10, 2012 reassessments of the Appellant's 2007, 2008 and 2009 taxation years, directing the Minister of National Revenue and/or the Attorney General of Canada to pay $100,000 to the Appellant as "punishment for her/their contempt of this Court" and awarding the costs of this motion on a full indemnity basis.

[2] This issue before the Court is whether the Minister breached the "implied undertaking rule" by using information obtained by the Respondent in the course of pre-trial discovery proceedings to reassess the Appellant.

Outline of Facts

[3] The Minister reassessed the Appellant on March 2, 2011 and March 11, 2011 for its 2007 and 2008 taxation years respectively (the "First Reassessments"). The

Appellant filed a notice of appeal from the First Reassessments with this Court on April 12, 2012.[1]

[4] The Appellant disagrees with the Minister's decision to disallow a portion of the amounts claimed by the Appellant for its 2007 and 2008 taxation years as eligible scientific research and experimental development expenses ("SR&ED").

[5] On the same day that the Appellant filed its notice of appeal with the Court, the Appellant provided the Respondent's counsel (the Department of Justice) with the following documents:

- A copy of the Appellant's notice of appeal
- Its list of documents (partial disclosure)
- Seven binders containing the 260 documents noted in its list of documents
- A Request to Admit
- An annotated Request to Admit.[2]

[6] The letter sent with those documents states in part:

> Please find enclosed a copy of the appellant's notice of appeal, list of documents, a copy of the documents in the list of documents, a request to admit and an annotated request to admit. This package has been prepared with the goal of minimizing time and cost in resolving this appeal. To this end, we ask that a meeting be arranged with a CRA officer able to instruct DOJ counsel as quickly as possible with the hope of reaching a settlement. Scheduling a settlement meeting at this early stage will save the DOJ the time and expense of preparing a reply, a list of documents, and answers to the request to admit.[3]

[7] On April 26, 2012, the Respondent's counsel served responses to the Appellant's Requests to Admit.[4]

[8] On May 7, 2012, the Court served the Appellant's Notice of Appeal on the Deputy Attorney General of Canada.[5]

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1 Affidavit of Michelle Mitchell, Exhibit 1, page 10.
2 Affidavit of Michelle Mitchell, paragraph 5, and Affidavit of Christopher M. Bartlett, paragraph 3 and Exhibit A, page 11.
3 Affidavit of Christopher M. Bartlett, Exhibit A, page 11.
4 *Ibid.*, Exhibit L, page 125.
5 *Ibid.*, Exhibit D, page 21.

[9] On May 28, 2012, the Appellant filed its list of documents (partial disclosure), which had previously been provided to the Respondent's counsel, with the Court.[6]

[10] The Appellant filed with the Court and served on the Respondent's counsel supplementary lists of documents on August 20 and 30, 2012. The Appellant's counsel provided copies of the listed documents to the Respondent's counsel on the same dates.[7]

[11] On July 4, 2012, the Respondent filed and served her reply.[8]

[12] On October 9, 2012, counsel for the Respondent informed the Appellant's counsel that their client, the Canada Revenue Agency (the "CRA"), intended to reassess the Appellant's 2007 and 2008 taxation years.[9]

[13] On October 11, 2012, counsel for the Respondent provided the Appellant's counsel with a copy of a letter from the CRA to the Appellant dated October 5, 2012, in which the CRA states that it is reassessing the Appellant's 2007 and 2008 taxation years.[10]

[14] On or about October 12, 2012, the Minister issued reassessments in respect of the Appellant's 2007, 2008 and 2009 taxation years (the reassessment with respect to the Appellant's 2009 taxation year is a "consequential adjustment").[11] I will refer to these reassessments as the "Second Reassessments".

[15] Counsel for the Respondent admitted that the Minister based the Second Reassessments, at least in part, on documents that she obtained for the first time in the course of pre-trial discovery, specifically, documents that were included in the Appellant's List of Documents and provided to counsel for the Respondent on April 12, 2012[12] (the "Discovery Documents").

Implied Undertaking Rule

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6 *Ibid.*, paragraph 8.
7 Affidavit of Michelle Mitchell, paragraphs 6 and 7.
8 Affidavit of Christopher M. Bartlett, paragraph 9.
9 Affidavit of Michelle Mitchell, Exhibit 3, page 40.
10 *Ibid.*, Exhibit 5.
11 *Ibid.*, paragraph 5.
12 Transcript of hearing, pages 85 and 97.

[16] The leading decision on the implied undertaking rule is the recent decision of the Supreme Court of Canada, *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157 ("*Juman*"). Justice Binnie stated the rule as follows at paragraph 4:

> Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, is subject to the implied undertaking. It is not to be used by the other parties except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.

[17] He noted that there are two good reasons for the rule.[13] The first reason is the invasive nature of pre-trial discovery. The Supreme Court explained this reason as follows at paragraphs 24 and 25:

> In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. [. . .]
>
> The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. . . . ***The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.*** [Emphasis added.]

[18] The second reason is the need for complete and candid discovery. As explained by the Supreme Court of Canada at paragraph 26:

> There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. [. . .]

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13 *Juman, supra*, at paragraphs 23 - 26.

[19] This Court has held on numerous occasions that the implied undertaking rule applies to pre-trial discovery under the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*").[14]

Position of the Appellant

[20] Counsel for the Appellant argued that the appeal of the First Reassessments commenced on April 12, 2012, the date the Appellant filed the Notice of Appeal with the Court.

[21] The Appellant argued that the Respondent breached the implied undertaking rule when the CRA used documents provided in the course of discovery to issue the Second Reassessments. It is the Appellant's position that the Second Reassessments are a separate proceeding from this appeal.

[22] Counsel argued that there would be a tremendous litigation chill in this Court if the CRA were permitted to use documents provided on discovery to reassess an appellant. She noted that such behaviour would significantly prolong the appeal process, since an appellant who is reassessed will be required to file a new notice of appeal and endure a second discovery. This would result in additional cost and delay.

[23] She put forward the proposition that, if the Court allows the Minister's conduct to stand, the Minister can effectively delay a dispute ad infinitum by reassessing, and that such a situation would undermine the role of this Court and the administration of justice.

Position of the Respondent

[24] The Respondent put forward several different arguments to support her position, however, counsel for the Respondent noted that the centrepiece of her argument is the fact that the relationship between the Minister and the taxpayer is a different relationship than that of normal litigants. Because of this relationship, the implied undertaking rule does not apply to the Minister in the fact situation before the Court.

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[14] See, for example, *Armstrong v. The Queen*, 2013 TCC 59, *506913 N.B. Ltd. v. The Queen*, 2012 TCC 210, [2012] G.S.T.C. 47, *Welford v. The Queen*, 2006 TCC 31, 2006 DTC 2353, and *Sherman v. The Queen*, [2000] T.C.J. No. 128 (QL), 2000 DTC 1970.

[25] Counsel noted that the relationship arises from a number of factors, including an appellant's obligation, under the *Income Tax Act*,[15] to maintain the information required for determining its liability and to produce such information to the Minister, and the Minister's obligation under subsection 220(1) of the *ITA* to assess a taxpayer. Further, the Minister has a duty to assess what she believes is the correct amount given the information in her possession, and is authorized under the *ITA* to assess even after a tax appeal has been initiated.

[26] It is the Respondent's position that while the implied undertaking rule may apply to the Minister in certain situations, it does not apply to the Minister when the taxpayer provides the information in the course of discovery, and the Minister uses the information to reassess the taxpayer with respect to the same issue and the same taxation year.

[27] The Respondent also argued that section 241 of the *ITA* provides a complete code governing how the Minister can use a taxpayer's information. In effect, it overrides the implied undertaking rule.

[28] She also focused on the Court's use of partial disclosure in its discovery proceedings and the low expectation of privacy that a taxpayer has, vis-à-vis the Minister, with regard to its tax records.

[29] Counsel for the Respondent raised one "preliminary" issue. She argued that the implied undertaking rule does not apply since the Appellant voluntarily provided the documents to the Respondent on April 12, 2012. It is the Respondent's position that the Appellant's appeal had not commenced at that point in time.

[30] In the alternative, the Respondent requests that she be provided with an opportunity to seek relief if I find that she breached the implied undertaking rule.

Application of the Law to the Facts

[31] I will first address the preliminary issue.

[32] With respect to when the proceedings commenced, it is my view that the Appellant's appeal commenced on April 12, 2012, the day the Appellant filed its notice of appeal with the Court.

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[15] R.S.C. 1985, c. 1 (5th Supp.) (the "*ITA*").

[33] This result is clear from section 17.2 of the *Tax Court of Canada Act*.[16] Subsection 17.2(1) of the *TCCA* states: ". . . a proceeding in respect of which this section applies shall be **instituted** by filing an originating document in the form and manner set out in the rules of Court. . . ."

[34] Subsection 17.2(2) of the *TCCA* provides that "[a]n originating document is deemed to be filed on the day on which it is received by the Registry of the Court."

[35] The Appellant filed a proper notice of appeal with the Registry on April 12, 2012. Pursuant to subsection 17.2 of the *TCCA*, the Notice of Appeal was filed on that date and the Appellant's appeal was instituted on that date.

[36] I do not accept the Respondent's argument that the appeal only commenced on May 7, 2012, the day the Court served the Notice of Appeal on the Respondent. While the *TCCA* provides that the Court shall serve the Notice of Appeal on the Respondent,[17] there is nothing in the *TCCA* or the *Rules* that would suggest that the proceedings are held in abeyance until the Court serves the notice of appeal. In fact, subsection 17.2(3) of the *TCCA* specifically refers to the Court serving the notice of appeal on the Respondent after the proceedings have been initiated.

[37] Further, it is clear from the Appellant's April 12 letter to the Respondent's counsel[18] that the Appellant had commenced an appeal in this Court.

[38] The Respondent acted as if the proceedings had commenced on April 12, 2012. On April 26, 2012, the Respondent's counsel served responses to the Appellant's Requests to Admit.[19]

[39] In summary, the Appellant did not voluntarily provide its list of documents and the noted documents to the Respondent on April 12, 2012. It provided them pursuant to the Court's rules for discovery. The fact that the Appellant provided the documents early on in an attempt to expedite the proceedings through a settlement did not result in the disclosure of the documents being voluntary.

[40] Having found that the Respondent obtained the Discovery Documents on April 12, 2012, in the course of discovery, I must determine whether the Respondent

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16 R.S.C. 1985, c. T-2 (the "*TCCA*").
17 Subsection 17.2(3) of the *TCCA*.
18 Affidavit of Christopher M. Bartlett, Exhibit A.
19 *Ibid.*, Exhibit L, page 125.

used those documents for a purpose "other than securing justice in the civil proceedings in which the answers were compelled . . . ."[20]

[41] It is clear to me, as a question of fact, that the Respondent used the Discovery Documents for another purpose when she used them to reassess the Appellant.

[42] The Appellant provided the Discovery Documents to the Respondent in the course of the discovery with respect to its appeal from the First Reassessments. Those civil proceedings involve an appeal under section 169 of the *ITA.* The result of such an appeal is a judgment of the Court which in effect binds the Minister and the Appellant (subject to their respective appeal rights).

[43] Under the *ITA*, the Appellant has a number of options with respect to the Second Reassessments: it may file a notice of objection, immediately appeal the Second Reassessments to the Court, or amend the appeal in respect of the First Reassessments by joining thereto an appeal in respect of the Second Reassessments.[21]

[44] Regardless of the steps the Appellant takes, the Second Reassessments gave rise to new litigation.

[45] I will now consider the Respondent's main argument that the implied undertaking rule does not apply to the Minister in the fact situation before the Court.

[46] I do not agree with this argument.

[47] The Respondent has previously relied on the implied undertaking rule in this Court. She now appears to be arguing that, while that rule applies to the Appellant, it only applies to the Respondent in limited circumstances.

[48] I cannot accept an argument that provides more favourable treatment to one of the parties before the Court.

[49] In my view, the Respondent's argument defeats the purpose of the implied undertaking rule. She is arguing that the Court should grant the Minister a permanent exclusion from the implied undertaking rule to allow the Minister to use any information she obtained from an appellant during a discovery to reassess the

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20 *Juman*, at paragraph 27.

21 Section 165 of the *ITA*.

appellant. Clearly, if the Court were to grant such a permanent exclusion, appellants would be hesitant to come to this Court and disclose documents and provide answers to the Respondent.

[50] The Respondent, like all parties before the Court, is subject to the implied undertaking rule. Once the Appellant provided the Discovery Documents to the Respondent **in the course of discovery**, there was an undertaking by the Respondent **to the Court** not to use the information for any purpose other than the appeal.

[51] Counsel for the Respondent noted that the CRA could have obtained the information in question during the course of its audit of the Appellant. While such a fact may be relevant when the Court is considering an application to modify or relieve against the implied undertaking, it is not a relevant factor when determining whether the Respondent has breached the implied undertaking. What is relevant when making such a determination is how the Minister actually obtained the information in question.

[52] It appears to me that most of the Respondent's arguments do not relate to the issue of whether the implied undertaking rule applies but rather relate to the issue of whether the Court should grant leave to allow the CRA to use the Discovery Documents to reassess the Appellant.

[53] The Respondent should have applied to the Court for leave for the CRA to use the Discovery Documents to reassess the Appellant if she felt that either the Minister's duty to assess under the *ITA* or a specific provision of the *ITA* (such as section 241) constitutes a statutory override of the implied undertaking rule. Similarly, she should have applied for leave if she felt that the CRA should be entitled to use the information because a potential reassessment involved the same taxpayer, the same issue and the same taxation year.

[54] Further, the Respondent should have applied for leave prior to the CRA using the information to reassess the Appellant. As the Supreme Court noted in *Juman* at paragraph 30:

> . . . Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:
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> > Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and

> the reasons why it is justified, and both sides will have to be heard on the application.[22]

[55] The Respondent appeared to argue, particularly with respect to section 241, that the statutory provisions clearly overrode the implied undertaking rule. In other words, since the Court would automatically grant leave, there was no need to apply for leave.

[56] In my view, a court will never automatically grant leave. The Supreme Court of Canada clearly stated in *Juman* that there is no situation where a court should automatically waive the implied undertaking rule. In fact, that Court emphasized that the implied undertaking rule should only be waived or modified in exceptional circumstances. For example, the Court stated at paragraph 38:

> As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an **undertaking should only be set aside in exceptional circumstances**. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. **However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside**.[23] [Emphasis added.]

[57] Although not needed, I wish to make an additional comment with respect to section 241 of the *ITA*. Counsel for the Respondent spent a significant amount of time arguing that section 241 permitted the Minister to use the Discovery Documents outside of the appeal.

[58] Section 241 is an administrative provision that is intended to protect the confidentiality of information given to the Minister by a taxpayer for the purposes of the *ITA*.[24] Subsection 241(1) establishes a strict prohibition against the use of taxpayer information. However, subsection 241(4) allows for the use of such information in numerous situations relating to the effective application of the *ITA*. This subsection only provides exceptions to the statutory prohibition contained in subsection 241(1); it does not override common law rules, such as the implied undertaking rule.

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22 See also paragraph 39.

23 *Juman*, see also paragraph 32.

24 See *Diversified Holdings Ltd. v. Canada*, [1991] 1 F.C. 595 (FCA) at page 598.

[59] The Respondent also argued that the implied undertaking rule was not meant to apply in this Court because of the partial disclosure in our discovery proceedings and the low expectation of privacy that a taxpayer has vis-à-vis the Minister with regard to tax records.

[60] The Court's rules do not in any way limit or diminish the implied undertaking rule. As the Supreme Court of Canada noted in *Juman* at paragraph 20,

> The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination.

[61] Regardless of whether they proceed before this Court under the partial disclosure or full disclosure rules,[25] the parties are required to disclose documents that are adverse to their interests.

[62] For example, the Court's partial disclosure rules allow an appellant to, in effect, only disclose, in the first instance, documents that are favourable to its case.[26] However, under section 105,[27] an appellant is required to produce during discovery any document requested by the Respondent that is in the possession or under the control of the appellant. Clearly, this would include documents that are adverse to the appellant's interest.

[63] The fact that the appellant has a low expectation of privacy with respect to its tax records is irrelevant. The implied undertaking rule applies whether or not the information in question was confidential.[28]

[64] As I stated in *506913 N.B. Ltd.*,[29] "A party may raise the privacy issue when seeking leave to have the undertaking waived; however, privacy is not a condition for the imposition of the undertaking in the first instance."

Remedies

[65] A number of forms of relief are open to the Court to remedy a breach of an implied undertaking. The Appellant is asking the Court to remedy the breach by

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25 See sections 81 and 82 of the *Rules*.
26 *Rules*, section 81.
27 *Rules*, section 105.
28 See *Juman*, at paragraph 27.
29 *Supra*, note 14, at paragraph 75.

vacating the Second Reassessments. The Appellant also asks the Court to find either the Minister or the Attorney General in contempt and to award the Appellant costs of this motion of a full indemnity basis.

[66] I will first address the appropriate remedy to correct the breach. I will then address the appropriate remedy for the conduct of the Respondent.

Remedy to correct the breach

[67] I accept the Appellant's argument that the Court has the ability, in these circumstances, to vacate the Second Reassessments.

[68] The Tax Court of Canada is the only superior court that has jurisdiction to vacate an assessment.[30] The *ITA* sets out certain situations where this Court may vacate an assessment that is appealed to the Court. As the Federal Court of Appeal noted in *Ereiser v. The Queen*,[31] when an appellant appeals an assessment (or reassessment) to this Court, the Court should only vacate the assessment if it is found not to be valid or if it is found not to be correct. The Court of Appeal explained the terms "valid" and "correct" as follows at paragraph 21:

> . . . I use the term valid to describe an assessment made in compliance with the procedural provisions of the *Income Tax Act*, and correct to describe an assessment in which the amount of tax assessed is based on the applicable provisions of the *Income Tax Act*, correctly interpreted and applied to the relevant facts.

[69] In my view, there is at least one other situation where this Court may vacate an assessment. Specifically, the Court may vacate an assessment under its implied jurisdiction to control its own process and ensure its proper functioning as a court of law.

[70] In *R. v. Cunningham*, Rothstein J., wrote for the Supreme Court of Canada:[32]

> [18] Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court,

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30 *Minister of National Revenue and Canada Revenue Agency v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, 2014 DTC 5001, paragraphs 111 and 93.

31 2013 FCA 20, 2013 DTC 5036, at paragraph 21.

32 2010 SCC 10, [2010] 1 S.C.R. 331 ("*Cunningham*").

> prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. . . .
>
> [19] Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
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> . . . the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime. . . .
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> (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51)
>
> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[71] The Tax Court of Canada is a both a superior court and a statutory court. In my view, in light of the Supreme Court of Canada's decision in *Cunningham*, any statutory limits placed on the Tax Court's jurisdiction when disposing of an appeal of an assessment (or reassessment) do not apply in respect of a breach of an implied undertaking. A breach of an implied undertaking is a breach of an undertaking to the Court. Remedying such a breach is an exercise of the Court's power to control its own process. As a result, the Court may vacate an assessment if it believes it is the appropriate remedy for the breach of an undertaking to the Court.

[72] I do not believe that vacating the Second Reassessments is the appropriate remedy in this motion. It is not clear to me from the affidavit evidence before the Court, that the Discovery Documents constitute the only information the CRA has to support the Second Reassessments. It may very well be the case that the Minister can support the Second Reassessments without the Discovery Documents. However, if she decides to defend an appeal by the Appellant of the Second Reassessments, she will have to do so without the Discovery Documents.

[73] My order will state that the Respondent cannot use the Discovery Documents in any other proceeding before this Court or any other court. If the Discovery Documents constitute the only evidence the Respondent has to support the Second Reassessments, my order should have the same effect as an order vacating the Second Reassessments.

Remedy with respect to conduct of the Respondent

[74] Contempt is an exceptional remedy when there is a breach of an implied undertaking. As the Supreme Court of Canada noted in *Juman*, it should only be used in the absence of a less drastic remedy.[33]

[75] In my view, contempt is not an appropriate remedy in this motion. The Court can deal with the conduct of the Respondent through its award of costs.

[76] The Appellant requests costs on a full indemnity basis. I do not believe that the Respondent's conduct warrants an awarding of costs on a solicitor and client basis. Such costs are reserved for cases of reprehensible, outrageous or scandalous behaviour.[34]

[77] However, it is my view that the conduct of the Respondent requires an award of substantial costs. The Respondent's use of the Discovery Documents without leave of the Court constitutes an abuse of process. That abuse was not inadvertent.

[78] The Respondent knew how the implied undertaking rule operates, and in particular, she knew of the need to seek leave before using in another proceeding information obtained in the course of discovery. Notwithstanding this knowledge, the Respondent elected to use the information outside of this appeal. It appears to me that the CRA and counsel for the Respondent decided to substitute their judgment with respect to when the implied undertaking rules should be waived for the judgment of the Court.

[79] During counsel for the Respondent's argument, I was left with the impression that the Respondent considered the Minister to have the same authority as the Court to determine the use of documents provided in the course of discovery. This is simply not correct. All parties who appear before the Court, including the Minister, are subject to the authority of the Court.

[80] In light of the Respondent's conduct, I have decided to award the Appellant costs of $25,000.

Finding of the Court

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33 *Juman*, paragraph 29.

34 See *Young v. Young*, [1993] 4 S.C.R. 3, at page 134.

[81] For the foregoing reasons, the Court orders the Respondent not to use any documents she obtained in the course of the discovery relating to the Appellant's appeal instituted on April 12, 2012 in any other proceeding before this Court or any other court. The Court's order does not apply to any documents that the CRA obtained prior to the date the Appellant instituted its appeal. The Appellant is awarded costs of $25,000.

[82] The Respondent shall have 30 days to file an application with the Court for leave to use the Discovery Documents in another proceeding.

Signed at Ottawa, Canada, this 20th day of February 2014.

"J. D'Arcy"

D'Arcy J.

CITATION:	2014 TCC 58
COURT FILE NO.:	2012-1452(IT)G
STYLE OF CAUSE:	FIO CORPORATION AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 25, 2013
REASONS FOR ORDER BY:	The Honourable Justice Steven K. D'Arcy
DATE OF ORDER:	February 20, 2014

APPEARANCES:

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Counsel for the Respondent:	Wendy Linden Eleanor H. Thorn Elizabeth Chasson

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