Federal Court of Appeal  Cour d'appel fédérale

**Date: 20170330**

**Docket: A-385-15**

**Citation: 2017 FCA 61**

**CORAM:** **NOËL C.J.**
**STRATAS J.A.**
**BOIVIN J.A.**

**BETWEEN:**

**BP CANADA ENERGY COMPANY**

**Appellant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

**and**

**CHARTERED PROFESSIONAL ACCOUNTANTS OF CANADA**

**Intervener**

Heard at Toronto, Ontario, on February 21, 2017.

Judgment delivered at Ottawa, Ontario, on March 30, 2017.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: STRATAS J.A.
BOIVIN J.A.

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## REASONS FOR JUDGMENT

**NOËL C.J.**

[1] This is an appeal brought by BP Canada Energy Company (BP Canada or the appellant) from an order of the Federal Court (2015 FC 714) wherein Campbell J. (the Federal Court judge) allowed an application filed by the Minister of National Revenue (the Minister) pursuant to

subsection 231.7(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act) compelling the production of internal accounting documents, generally referred to as tax accrual working papers (TAWPs). The order was issued for the purpose of assisting the Minister in conducting ongoing audits of BP Canada.

[2] The information contained in TAWPs is highly sensitive as these papers typically reveal uncertain tax positions taken by public corporations in filing their tax returns, opinions as to the likely outcome in the event of a challenge by the Minister, and related reserves established to ensure sound and fair financial reporting. BP Canada maintains that the Federal Court judge failed to take into account the exceptional nature of this information in ordering its production and committed a variety of related errors.

[3] The Chartered Professional Accountants of Canada as intervener (CPA Canada or the intervener) contends that formal requests for the production of TAWPs cannot be routine and uncontrolled, and that the obligation to produce TAWPs should not undercut the public interest role of its members in certifying financial statements. CPA Canada takes no position on the outcome of the appeal.

[4] For the reasons which follow, I am of the view that the documents ordered to be produced, given the purpose for which they were sought, are beyond the reach of the Minister, and that the Federal Court judge committed a number of legal and factual errors in ordering their production. Therefore, I propose that the appeal be allowed.

[5] The statutory provisions relevant to the analysis are set out in the appendix to these reasons.

**BACKGROUND**

[6] BP Canada is a Canadian subsidiary of BP plc, a U.K. company active principally in the oil and gas industry (Appeal Book, vol. IV, p. 443, para. 20). Being a publicly-traded company, BP plc is required to prepare consolidated financial statements in accordance with Generally Accepted Accounting Principles (GAAP) (Appeal Book, vol. IV, p. 440, para. 5). In the process leading to the issuance of these financial statements, the appellant internally created papers under the heading "BP Canada Tax Reserve" (Tax Reserve Papers). They reflect, among other things, the uncertain tax positions adopted by BP Canada in filing its tax returns, also referred to as "soft spots", as well as the corresponding analyses behind the contingent tax reserves (Appeal Book, vol. IV, p. 440, para. 6).

[7] The events which led to the issuance of the formal request for the production of BP Canada's Tax Reserve Papers need to be reviewed in some detail as they determine the outcome of this appeal.

[8] In the course of the audit of BP Canada's 2005 taxation year, the audit manager and her group (collectively "the auditor") identified an issue relating to refund interest paid by the Minister to the appellant. The auditor reviewed two accounts maintained by BP Canada in which this payment could have been recorded (Appeal Book, vol. II, p. 53, para. 13). Being unable to

trace the refunded interest to either account, the auditor issued Query 2005-8 (Appeal Book, vol. IV, p. 593).

[9] The audit eventually revealed that BP Canada reported the refund interest payment in 2007, when it should have been included for the 2005 taxation year (Appeal Book, vol. IV, p. 444, para. 23). During the process leading to this adjustment, the auditor became interested in several accounting entries in one of two accounts, namely the "Interest Expense Taxes Payable – Disputed Accruals" account (Appeal Book, vol. IV, p. 445, paras. 27-28 and Appeal Book, vol. II, p. 54, para. 15). In order to verify the source of those accounting entries, Query 2005-10 was issued requesting the disclosure of the "original supporting working papers" for this account (Appeal Book, vol. II, p. 98 and Appeal Book, vol. III, p. 250, lines 9-18). The "original supporting working papers" for this account were BP Canada's Tax Reserve Papers.

[10] The appellant initially refused to comply with Query 2005-10. The reason for this refusal was that, first, disclosure of its Tax Reserve Papers would not only provide the Minister with a roadmap to its uncertain tax positions, but the Minister would also gain access to the analyses behind those positions (Appeal Book, vol. IV, p. 446, para. 31). Second, the appellant took the position that the issue raised in that query had already been addressed (Appeal Book, vol. IV, pp. 444-445, paras. 24-26).

[11] During a meeting on May 4, 2010, the auditor advised that the query was not to be read as requesting details concerning BP Canada's uncertain tax positions (Appeal Book, vol. IV, p. 446, para. 32 and p. 447, para. 34). In response, BP Canada offered to produce a redacted version

of its Tax Reserve Papers showing all amounts, but without revealing the uncertain tax positions or the underlying analyses. This would show the auditor that the accounting entries of interest were not linked to a taxable source (Appeal Book, vol. IV, p. 446, para. 32). The auditor agreed to this subject to the right to insist on the full disclosure of the Tax Reserve Papers if the redacted version did not provide a satisfactory answer (Appeal Book, vol. IV, p. 446, para. 33).

[12] A copy of BP Canada's redacted Tax Reserve Papers was provided to the auditor on May 13, 2010 (Appeal Book, vol. IV, p. 447, para. 35). The redacted Tax Reserve Papers did address the concern about the accounting entries, but they gave rise to another concern: the taxes that were proposed to be assessed were materially lower than the reserves set out in BP Canada's Tax Reserve Papers. This flagged a significant tax revenue loss. On June 17, 2010, the auditor made a formal request for the unredacted version, insisting that the uncertain tax positions be shown (Appeal Book, vol. IV, p. 448, para. 37).

[13] Numerous exchanges followed. Both parties firmly maintained their respective positions (Appeal Book, vol. IV, pp. 449-452, paras. 41-53). On October 1, 2010, the auditor received information establishing that contrary to what the numbers indicated, the amounts associated with the uncertain tax positions in BP Canada's Tax Reserve Papers were significantly lower than the projected assessment (Appeal Book, vol. IV, p. 451, paras. 49-50). This however did not resolve the matter as the auditor took the position that these papers had to be produced whether the concern surrounding these amounts was justified or not (Appeal Book, vol. III, p. 348, lines 9-13).

[14] On October 15, 2010, the appellant confirmed that it was not going to produce the unredacted version of its Tax Reserve Papers, and the auditor responded by announcing that a compliance order would eventually be sought (Appeal Book, vol. IV, p. 452, para. 53).

[15] The 2006 and 2007 audits were then undertaken with similar requests being issued for the full and complete disclosure of "all original working papers of the current income tax liability […], including but not limited to the Reserve for Adverse Taxes" (Appeal Book, vol. IV, pp. 452-453, paras. 55 and 57). The appellant again opposed these requests and submitted redacted versions.

[16] On May 8, 2012, the Minister brought an application before the Federal Court under subsection 231.7(1) of the Act seeking an order "for the production of [BP Canada's] working papers requested by the Minister of National Revenue in Query 2005-10.1, Query 2006-16 and Query 2007-6" (Appeal Book, vol. II, pp. 46-49).

[17] By this time, the Minister had already reassessed the 2005 and 2006 taxation years. Thus, BP Canada's working papers were no longer sought for the purpose of auditing those years (Appeal Book, vol. II, p. 61, para. 45). The stated purpose for obtaining the Tax Reserve Papers was to audit the 2007 and subsequent taxation years (*Ibidem*).

[18] Before the Federal Court judge issued his decision, the 2007 taxation year was reassessed with the result that only the subsequent taxation years remained under audit. In this respect, the parties informed the Court during the hearing of the appeal that the Minister has since issued

requests for the production of BP Canada's Tax Reserve Papers in an unredacted form for the 2008, 2009 and 2010 taxation years. The parties are agreed that BP Canada's obligation to comply with these outstanding requests turns on the outcome of this appeal.

**FEDERAL COURT DECISION**

[19] The Minister took the position before the Federal Court judge, and before us, that the documents being sought are those "that list [BP Canada's] uncertain tax positions" (Minister's Memorandum, para. 8). The documents so described were referred to by the parties in the proceeding below as the "Issues Lists". The Federal Court judge adopted this language throughout his reasons, but the order that he issued makes no reference to it.

[20] In allowing the application, the Federal Court judge addressed two issues: whether the Issues Lists come within the scope of subsection 231.1(1) of the Act; and if so, whether he should exercise his discretion not to compel the disclosure of this information.

[21] Before addressing these issues, the Federal Court judge provided a summary of the Minister's policy with respect to accessing TAWPs. It is useful to reproduce the 2004 and 2010 extracts which he quoted (Reasons, paras. 11-12, without emphasis):

> 2004
>
> It is not the policy or practice of the Department routinely to request audit files from accountants for inspection. Normally, any such request would result only when the auditor's files form part of the taxpayer's records and a proper examination could not be carried out without access to those files.
>
> […]

> It is not the policy of the CCRA to request a general access to accountant's working papers for the purpose of scrutinizing them in the course of conducting an audit.
>
> 2010
>
> CRA Officials are authorized to request and receive any documents needed to conduct a proper inspection, audit or examination, subject to solicitor-client or litigation privilege.
>
> […]
>
> "any document" includes accountants' and auditors' working papers that relate to a taxpayer's books and records and that may be relevant to the administration or enforcement of the ITA, ETA, and other relevant legislation. Accountants' and auditors' working papers include working papers created by or for an independent auditor or accountant in connection with an audit or review engagement, advice papers, and tax accrual working papers (including those that relate to reserves for current, future, potential or contingent tax liabilities).
>
> […]
>
> Although not routinely required, officials may request tax accrual working papers.

[22] Addressing first the issue of the compellability of the Issues Lists, the Federal Court judge summarily rejected the arguments put to him by the appellant. In response to BP Canada's assertion that the Minister did not need the Issues Lists in order to perform the audit, the Federal Court judge acknowledged that this "might very well be true, except for the fact that the Minister wants them, not only to expedite the audit process, but also for use in its continuing and future [audits]" (Reasons, para. 23). According to the Federal Court judge, only the Minister can determine what is required in order to advance the audit process (*Ibidem*).

[23] The Federal Court judge also dismissed the contention that forcing the disclosure of the Issues Lists would cause the appellant to self-audit rather than to self-assess. He pointed out that

the Minister was not asking for anything to be prepared, but rather sought disclosure of already-prepared documents (Reasons, para. 24).

[24] The Federal Court judge further rejected the contention that the Issues Lists were not compellable because they were not required to be kept under the Act. In his words, the Issues Lists "are relevant to the payment of tax under the *Act* because they are an important tax record in BP Canada's possession" (Reasons, para. 25).

[25] According to the Federal Court judge, the Issues Lists come within the scope of subsection 231.1(1) of the Act, as they relate to the determination of taxable income. In his view, the Minister's purpose of taxation accountability is related to the enforcement of the Act as stated in *Tower v. MNR*, 2003 FCA 307, [2004] 1 F.C.R. 183 [*Tower*]. Moreover, the Issues Lists "relate to information in BP Canada's records" and they "relate to an amount payable by BP Canada under the *Act*" (Reasons, para. 26). He added that although the "[TAWPs] contain subjective analyses of tax risk, together with factual information upon which tax reporting is founded, […] they are relevant to BP Canada's intention in creating the reserves" (*Ibidem*).

[26] The Federal Court judge also dismissed the public policy concerns hovering over independent auditors if TAWPs are held to be compellable. In his words (Reasons, para. 29):

> By bringing the present Application, the Minister is adhering to, and implementing the policy that, without restriction, [TAWPs] are compellable under the *Act*. In the circumstances of the present case, and in view of the conclusion just expressed agreeing with the Minister's position, if concerns arise within the industry, of which BP Canada is a part, it is for the Minister to address the concerns. The Minister is taken to know the ramifications of a successful outcome on the legal issue in the present Application. The public and industry interest is within the Minister's purview, and not the Court's.

[27] The Federal Court judge went on to dismiss BP Canada's contention that if the Issues Lists are compellable, the Court should decline to exercise its discretion in favour of the Minister. In so doing, the Federal Court judge rejected the contention that the auditor was on a fishing expedition because the purpose underlying the request for disclosure had changed over time. According to him, the auditor's intention "was specifically to obtain a clear roadmap to be used for current and future audits" (Reasons, para. 38).

[28] The Federal Court judge further rejected the contention that the auditor acted in bad faith or with "an underlying pernicious intention to mislead" (Reasons, para. 35). In his view, while this argument raised "an unresolved serious triable issue on a balance of probabilities" (Reasons, para. 39), it rested on speculation on the part of the appellant. In his view, the behaviour of the auditor could be explained by a *bona fide* exercise of the powers granted under the Act (Reasons, paras. 40-44).

[29] Lastly, the Federal Court judge rejected the appellant's argument that it was unfairly singled out by the Minister. According to him, the question was "fairness to whom?" (Reasons, para. 47). If the Minister does not discover uncertain tax positions within the limitation period, Canadian taxpayers lose. In his view, it was only fair and just that these issues be identified in good time and resolved by the courts (*Ibidem*).

[30] The Federal Court judge went on to order BP Canada to produce the "working papers requested by the Minister of National Revenue in Query 2005-10.1, Query 2006-16, and Query 2007-6" pursuant to subsection 231.7(1) of the Act (Order of the Federal Court).

**POSITION OF THE PARTIES**

- *The appellant*

[31] The appellant submits that subsection 231.1(1) of the Act is a "fact-finding tool" available to the Minister only for the purpose of establishing a relevant fact (BP Canada's Memorandum, para. 46). A "relevant fact" in turn is understood to mean a fact that will establish a taxpayer's taxable income or tax liability (BP Canada's Memorandum, para. 46). While the word "fact" is nowhere to be found in subsection 231.1(1), the appellant maintains that the word "information", which is used in the subsection, has to be interpreted to mean a fact that is relevant to taxable income or tax liability. This interpretation is rooted in the wording of a companion provision, subsection 230(1), which requires taxpayers to keep books and records containing "information as will enable the taxes payable under this Act or the taxes or other amounts that should have deducted, withheld or collected to be determined" (BP Canada's Memorandum, para. 55).

[32] Such an interpretation would strike the appropriate balance with, on the one side, the Minister's obligation to administer the Act, and on the other, the appellant's reasonable expectation of privacy over the Issues Lists (BP Canada's Memorandum, paras. 59 and 65 citing *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568).

[33] Since the Minister neither alleges nor establishes that the Issues Lists constitute relevant facts, but is rather seeking them to establish a roadmap for the audit, the appellant argues that the appeal should be allowed on this basis alone (BP Canada's Memorandum, para. 47).

[34] In the alternative, the appellant maintains that the Federal Court judge erred in not exercising his discretion against the Minister (BP Canada's Memorandum, para. 73). If allowed to stand, the order would bestow upon the Minister an "unqualified right" to require taxpayers to disclose any issues identified in preparing their tax returns (BP Canada's Memorandum, para. 75(a)). Such a right would be available even in the absence of a reasonable basis for considering that the information sought is relevant in determining whether the tax return under audit is correct (BP Canada's Memorandum, para. 75(b)).

[35] The appellant submits that giving paragraph 231.1(1)(*a*) a scope as wide as the Minister contends must be avoided. It notes that Parliament has declined to grant the Minister such wide powers (BP Canada's Memorandum, para. 76(a)); the efficacy of such auditing powers would be nil if companies were to assert solicitor-client privilege over TAWPs (BP Canada's Memorandum, para. 76(b)); and there is no harm in applying a restrictive interpretation to subsection 231.1(1) of the Act and requiring the Minister to prove that the Issues Lists are relevant facts (BP Canada's Memorandum, para. 76(c)).

[36] Additionally, the appellant warns the Court against relying on American jurisprudence, in particular *United States v. Textron Inc.*, 577 F.3d 21, 26-30 (1st Cir. 2009) [*Textron*]. The appellant submits that in the U.S., access to TAWPs is governed by specific regulations. In

Canada, legislation has not been enacted which would control access to TAWPs (BP Canada's Memorandum, para. 77).

[37] The appellant further asserts that it was unreasonable for the Minister to seek disclosure of the Issues Lists in contravention with published policy and for "an improper and unauthorized purpose" (BP Canada's Memorandum, para. 78). Short of exceptional circumstances, the Minister should not be allowed to obtain the Issues Lists and the Federal Court judge should have exercised his discretion against the issuance of the order (BP Canada's Memorandum, para. 84).

- *The intervener*

[38] CPA Canada highlights the professional, ethical and practical concerns raised by routine and uncontrolled requests for TAWPs (Intervener's Memorandum, para. 4). Professional accountants have a direct role in ensuring a degree of confidence in publicly-traded corporations' financial statements through independent auditing. Because they act in the public interest, they are subject to professional and ethical obligations, such as an obligation of integrity, a duty of care, and a duty of objectivity (Intervener's Memorandum, para. 18). In keeping with those obligations, professional accountants have to review TAWPs prepared by the corporations which they audit (Intervener's Memorandum, para. 22) in addition to preparing their own TAWPs (Intervener's Memorandum, para. 23).

[39] CPA Canada thus fears that the order, if allowed to stand, will cause corporations to "hesitate to voluntarily and fully disclose their tax risks" (Intervener's Memorandum, para. 33).

Moreover, routine access by the Minister to subjective opinions on tax risks may "discourage corporations from preparing such analysis in order to protect it from disclosure" (Intervener's Memorandum, para. 38).

[40] CPA Canada invites the Court to interpret subsection 231.1(1) of the Act in light of "the global context of rules of professional ethics and financial reporting" (Intervener's Memorandum, para. 44). This means that only objective information would be subject to production, such as the "disclosure of all transactions that could have a material impact on the corporation's tax liability, without identifying the degree of tax risk that any of those transactions may have" (Intervener's Memorandum, para. 53).

- *The Minister*

[41] The Minister supports the conclusion reached by the Federal Court judge and relies essentially on the reasons that he gave. According to the Minister, the Issues Lists fall squarely within broad auditing powers.

[42] The Minister adds that the purpose behind the request for disclosure of the Issues Lists is a "tax compliance audit" that relates to the administration or enforcement of the Act within the meaning of subsection 231.1(1) (Minister's Memorandum, para. 21). Disclosure of the appellant's uncertain tax positions "with which the Minister may disagree and which, in [BP Canada's] opinion, the Minister may challenge successfully" furthers efficiency: the Minister will be able to focus resources on problem areas (Minister's Memorandum, paras. 20 and 27, citing BP Canada's Memorandum, para. 18).

[43] The Minister maintains that the ability to properly administer the Act requires broad powers to obtain information and the empowerment to make use of all available risk assessment techniques (Minister's Memorandum, paras. 28-30).

[44] Furthermore, the Minister maintains that the Federal Court judge made no palpable and overriding errors of fact. According to the Minister, the Federal Court judge properly rejected any suggestion that the auditor acted dishonestly or for an improper purpose. Nor could it be said that the Federal Court judge misunderstood the nature and purpose of TAWPs (Minister's Memorandum, paras. 32-37).

[45] While the Minister agrees that the Federal Court judge retains discretion not to compel disclosure under subsection 231.7(1) of the Act, it remains the case that this Court should follow in the footsteps of the Federal Court judge and American courts in rejecting the appellant's position. First, it was open to the Federal Court judge to find that neither bad faith, dishonesty, nor unfairness arose from the auditor's conduct (Minister's Memorandum, paras. 45-47). As to U.S. jurisprudence, the Minister refers specifically to *Textron* and *United States v. Arthur Young & Co*, 465 U.S. 805 (1984) [*Arthur Young*] where arguments of the kind advanced by CPA Canada were rejected (Minister's Memorandum, paras. 48-50).

[46] The Minister disagrees with the appellant's view that Parliament has not put its mind to this issue. The present wording of subsection 231.1(1) is as broad as can be. Parliament has given the Minister the necessary powers to compel TAWPs (Minister's Memorandum, para. 51).

**ANALYSIS**

- *The documents in issue*

[47] Before turning to the decision under appeal, it is useful to consider the information contained in TAWPs generally, and in BP Canada's Tax Reserve Papers specifically.

[48] The expression "tax accrual working papers" generally refers to papers created by or for independent auditors in order to assist in the process leading to the certification of financial statements in accordance with GAAP. In Canada, the obligation to issue financial statements that are certified by independent auditors is imposed under provincial securities legislation (Appeal Book, vol. IV, p. 440, para. 5). TAWPs can be created internally or by the independent auditors but in both cases, their purpose is to identify uncertain tax positions and provide for reserves which will allow the independent auditors to certify that the financial statements fairly and accurately reflect the financial situation of the corporation under audit.

[49] Given the reason for which they are prepared, TAWPs typically identify tax positions capable of being challenged successfully by the Minister, an opinion as to the likely outcome in the event that they are, and a reserve intended to neutralize the financial distortion which would result. To the extent that an uncertain tax position endures from one year to the next, the reserve associated with the position is re-evaluated each year.

[50] BP Canada's Tax Reserve Papers were prepared internally for use by the independent auditors in accordance with the applicable accounting standards. Although partially redacted,

these papers identify the issues that are considered capable of being challenged successfully by the Minister under the heading "issue" or "income tax issue" (item #1); the underlying analyses leading to the selection of the issues identified as uncertain (item #2); the "tax at risk" being a quantification of the amounts by which BP Canada's liability for tax and related interest could increase if the Minister was to reassess these issues and prevail on appeal (item #3); and the reserve reflecting the total of these contingent liabilities for the year (item #4) (Appeal Book, vol. IV, pp. 440-441, paras. 5-7 and p. 447, paras. 31-32).

[51] BP Canada's Tax Reserve Papers insofar as they reflect the "tax at risk" amounts and the annual reserve – items #3 and #4 – were provided to the Minister, but the uncertain tax positions and the underlying analyses – items #1 and #2 – were redacted.

- *The scope of the order*

[52] There was uncertainty about whether the order under appeal only compels the production of BP Canada's uncertain tax positions or whether the underlying analyses are also to be produced.

[53] On this point, the reasons given by the Federal Court Judge when read with the order that he gave cause confusion. The Federal Court judge identifies the question before him as whether the Minister is entitled to compel BP Canada to disclose the "Issues Lists" (Reasons, para. 8) and concludes that BP Canada must "disclose the Issues Lists" (Reasons, para. 48). The analysis that takes place in between is conducted throughout by reference to the Issues Lists. However, the order that he gave makes no reference to the Issues Lists. Rather, it compels the production of

"the working papers requested by the Minister" in the queries, which begs the question as to precisely what was requested by these queries (Order of the Federal Court).

[54] Given this, the appellant expressed concerns that the order could be read as compelling the production of both the uncertain tax positions and the underlying analyses. According to the appellant, this result would be inadvertent as the Minister was only seeking access to its uncertain tax positions (BP Canada's Memorandum, paras. 85-87).

[55] The Minister took issue with that view up to the time of the hearing before us (Minister's Memorandum, para. 58). At the hearing, counsel conceded that the order would go beyond the relief sought if it was read as compelling the production of the underlying analyses. As a result, the reasons which follow only address the compellability of those parts of BP Canada's Tax Reserve Papers which reflect its uncertain tax positions.

- *Standard of review*

[56] The construction that the Federal Court judge gave to subsection 231.1(1) of the Act in granting the order under appeal gives rise to a question of law to be assessed on a standard of correctness whereas his application of this provision to the documents in issue gives rise to a mixed question of fact and law, with respect to which he is entitled to deference in the absence of an extricable question of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8 and 36).

- *The construction of subsection 231.1(1) of the Act*

[57] As in all such cases, the words of subsection 231.1(1) must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 at para. 20).

[58] I agree with the Federal Court judge that subsection 231.1(1) could not have been drafted in broader terms. Based on the plain language of subsection 231.1(1), a document which "relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable under [the] Act" is accessible under that provision.

[59] The introductory words of subsection 231.1(1) specify that in order to invoke this broad wording, the Minister must be acting for a purpose relating to the administration or enforcement of the Act. In the context of paragraph 231.1(1)(*a*), that purpose is verifying compliance with the Act. In the present case, the Minister has made clear that the purpose is to seek access to BP Canada's uncertain tax positions. The Minister wants to use these positions as a roadmap in order to facilitate audits conducted under the Act. Based on a literal reading of the introductory words, this looks like an authorized purpose.

[60] Once it is shown that the Minister is acting for an authorized purpose, one of three demonstrations must be made in order to trigger the application of paragraph 231.1(1)(*a*). Either the document or the part thereof being sought: (1) is part of, or is in, the "books and records of

the taxpayer"; (2) "relates or may relate to the information that is or should be in the books or records of the taxpayer"; or (3) "relates or may relate [...] to any amount payable by the taxpayer under [the] Act."

[61] On a plain reading, the parts of BP Canada's Tax Reserve Papers which reflect its uncertain tax positions can be shown to meet the second and third tests. Although the uncertain tax positions were not recorded by reason of any obligation arising under the Act, it remains that they "relate or may relate" to information that is in the books or records of BP Canada, if only because they were quantified on the basis of information that can be found in those books or records. As well, the reference to "any document that relates or may relate" to information that can be found in the books or records kept under the Act necessarily comprises documents other than those that are required to be kept under the Act.

[62] As to the third test, the simple fact that access to BP Canada's uncertain tax positions may allow taxable amounts to be identified provides a connection with the amounts payable by BP Canada under the Act.

[63] The appellant proposes a different reading. It submits that subsection 231.1(1) must be read with subsection 230(1) which deals with the obligation to keep books and records. When so read, the word "information" in paragraph 231.1(1)(*a*) necessarily means "facts", and these can only be objective facts that are relevant in determining a taxpayer's liability under the Act. Specifically, "subjective opinions as to which of its interpretative conclusions the Minister may

dispute […] are not facts that are relevant in determining [BP Canada's] taxable income or its tax liability" (BP Canada's Memorandum, para. 69(b)).

[64] There are problems with the reading proposed by the appellant. Paragraph 231.1(1)(*a*) provides access to facts as the appellant contends, but also to information. The word "information" as it appears in paragraph 231.1(1)(*a*) is unqualified. As was stated by this Court with respect to the use of the same word in section 231.2, "information" includes knowledge (*Tower*, at para. 20) and knowledge can be both objective and subjective. In any event, this debate seems futile as it is a fact, and an objective one at that, that BP Canada views the positions identified in its Tax Reserve Papers as uncertain.

[65] Beyond this, the appellant's argument does not address the second test set out in paragraph 231.1(1)(*a*) which, as explained, permits access to the parts of BP Canada's Tax Reserve Papers that reveal its uncertain tax positions because these documents relate to information that is or should be in its books and records (see paragraph 62 above). As to the third test, the key words are "relates or may relate to […] any amounts payable […]" not "relevant to the determination of any amounts payable […]" as the appellant would have it. As noted, this necessarily extends to documents reflecting information that can assist in identifying amounts payable under the Act.

[66] This language, read on its own, gives the Minister access to any documented information that can assist in carrying out auditing functions. BP Canada's uncertain tax positions can certainly be viewed as coming within this description. This, however, does not settle the debate.

[67] The issue in this case is not whether the information revealed by BP Canada's Tax Reserve Papers could be accessible under the Act. After all, everyone is agreed that it is, if required, in order to respond to a specific inquiry made in the context of an audit. The disclosure of the redacted version of BP Canada's Tax Reserve Papers in response to the query made about the accounting entries attests to this (see paragraphs 11 and 12 above). The real issue is whether subsection 231.1(1) allows general and unrestricted access to this information, if this is indeed what was sought and authorized in this case.

- *What was sought and authorized?*

[68] CPA Canada has intervened because of its belief that the decision under appeal does authorize general and unrestricted access to BP Canada's Tax Reserve Papers. The appellant shares that view insisting that the concerns advanced by the auditor in order to justify the need to access these papers were all addressed during the course of the audit.

[69] The Federal Court judge did not discuss the circumstances which led the Minister to bring the application before him. These must be reviewed in order to understand what his decision stands for.

[70] The record reveals that the auditor began the 2005 audit by conducting a review of various issues identified by using conventional auditing techniques. A series of inquiries led to a request for the "original supporting working papers" for specified entries in a particular account under review. The source documents to be produced in response to this query were BP Canada's Tax Reserve Papers (see paragraph 9 above).

[71] BP Canada agreed to give the auditor a redacted version of its Tax Reserve Papers which showed the "tax at risk" amounts associated with its uncertain tax positions. This satisfied the auditor's initial concern. However, the "tax at risk" amounts were such that the issue "evolved into something bigger" (Appeal Book, vol. III, p. 300, lines 4-10). The auditor observed that the "tax at risk" amounts were "materially bigger" than those which were proposed to be added to BP Canada's income for the year (Appeal Book, vol. II, p. 57, para. 28 and Appeal Book, vol. III, p. 283, lines 19-27). As a result, a decision was made to seek the disclosure of the uncertain tax positions which gave rise to the "tax at risk" amounts for 2005 (Appeal Book, vol. III, p. 282, lines 3-9 and p. 283, lines 2-6). The redacted Tax Reserve Papers provided for 2006 and 2007 reflect "tax at risk" amounts that exceed those disclosed for 2005 (Appeal Book, vol. V, pp. 774, 779, and 786).

[72] I am not at liberty to identify the "tax at risk" amounts, because this information is protected by a publication ban issued by the Federal Court, which is binding on this Court (Rule 152(3) of the *Federal Courts Rules*, S.O.R./98-106). It suffices to say that the gap between these amounts and those proposed to be assessed is such that one can understand why the auditor, after coming upon this information, would have felt justified to insist on the production of BP Canada's uncertain tax positions.

[73] However, as it turned out, this became a non-issue as BP Canada was able to demonstrate that the situation was the opposite of what it appeared to be, *i.e.*, BP Canada's "tax at risk" amounts were actually much smaller than the amounts underlying the auditor's risk assessment (Appeal Book, vol. V, p. 748).

[74] The record further reveals that when apprised of this demonstration, the auditor commended BP Canada for making it available, but took the position that BP Canada's Tax Reserve Papers had to be produced whether or not the "tax at risk" amounts were a cause for concern (Appeal Book, vol. II, pp. 167-176). Therefore, the auditor insisted on compliance in order to complete the 2005 audit. Similar requests were made for the 2006 and 2007 taxation years. The auditor made it clear that these requests were made in order to make the conduct of the audits for those years more cost efficient and confirmed that similar requests would be made for future years (Appeal Book, vol. III, p. 307, lines 10-14). As noted, requests have since been issued for 2008, 2009 and 2010.

[75] During the hearing, counsel for the Minister insisted that the auditor did not start out asking for production of the TAWPs. Rather, the auditor raised legitimate questions which led to the production of BP Canada's Tax Reserve Papers showing the "tax at risk" amounts. This in turn led to other questions which culminated with a formal request for the production of those parts of BP Canada's Tax Reserve Papers which identified its uncertain tax positions.

[76] That is a fair depiction of what transpired so far as it goes. However, as explained, the auditor continued to insist on compliance with the request after all these legitimate concerns had been addressed. Focusing on the last concern – *i.e.* the magnitude of the disparity between BP Canada's "tax at risk" amounts and those identified in the auditor's risk assessment – I agree that the auditor did not verify the analysis prepared by BP Canada in response, given the stated belief that BP Canada's uncertain tax positions had to be produced regardless of what this analysis showed. However, the fact that BP Canada's analysis effectively puts this concern to rest cannot

be questioned as the analysis is part of the record (Appeal Book, vol. V, p. 748) and the Minister has not seen fit to challenge it nor the conclusion which BP Canada draws from it (Appeal Book, vol. V, p. 751).

[77] Counsel for the Minister further argued that the uncertain tax positions identified by BP Canada's Tax Reserve Papers should be viewed as aggressive positions which called for further inquiry because they were all "risked at 100%" (Appeal Book, vol. IV, pp. 671 and 673). However, as explained during the hearing, there is no correlation between this percentage and the soundness of the position to which it relates. The optimization of the reserves simply reflects a conservative approach to financial reporting. This explains why the auditor did not see this as a concern.

[78] Therefore, we are left with a request for the production of BP Canada's Tax Reserve Papers with respect to which a compliance order was sought and obtained on the sole basis that these papers are compellable under the Act "without restriction" (Reasons, para. 29; Appeal Book, vol. III, p. 349, lines 11-14).

[79] The Federal Court judge's decision is the first one that authorizes the Minister to resort to the power under subsection 231.1(1) in order to obtain general access to TAWPs without advancing any particular justification for their production. Should it stand, BP Canada will be required to routinely turn over to the Minister its uncertain tax positions every year from this point on and the Minister will be authorized to place the same demand on all taxpayers who, by law, are required to maintain TAWPs. Indeed, the Minister would be hard-pressed not to do so,

given the Federal Court judge's conclusion that his decision applies equally to all taxpayers who maintain TAWPs (Reasons, para. 46).

[80] In my view, subsection 231.1(1), properly interpreted, does not make papers such as these compellable "without restriction". When one examines the context and purpose of subsection 231.1(1), it is clear that Parliament intended that the broad power set out in subsection 231.1(1) be used with restraint when dealing with TAWPs. It follows that the decision of the Federal Court judge must be set aside.

- *Self-assessment vs self-audit*

[81] An important part of the context surrounding subsection 231.1(1) is the notion of self-assessment which is at the root of the compliance system put in place under the Act. The system is one of self-assessment because the person who generates income is best positioned to identify, compute and report the amounts that are subject to tax under the Act.

[82] However, this obligation to "self-assess" does not require taxpayers to tax themselves on amounts which they believe not to be taxable. Faced with an issue that is reasonably open to debate – I emphasize this point insisting on the fact that the case law is replete with decisions which illustrate the coexistence of arguable issues on both sides of the debate – taxpayers are entitled to file their tax return on the basis most favourable to them. This explains why auditors in conducting audits must engage in extensive poke-and-check exercises, and are essentially left to their own initiative in verifying the amounts reported by the taxpayer. To be clear, although

auditors are entitled to be provided with "all reasonable assistance" in performing their audits (paragraph 231.1(1)(*d*) of the Act), they cannot compel taxpayers to reveal their "soft spots".

[83] While this is an unwritten rule without clearly defined boundaries, it certainly stands against any construction of the Act that would allow the Minister to compel a taxpayer to self-audit on an ongoing basis.

[84] The Federal Court judge did not believe that his order imposed on BP Canada an ongoing obligation to self-audit. He explained that he did not order BP Canada to prepare documents listing its uncertain tax positions, but to turn over existing ones which reflect this information (Reasons, para. 24).

[85] With respect, this is a distinction without a difference. BP Canada has no choice but to document its uncertain tax positions annually and the Federal Court judge has confirmed the Minister's access to these documents through legal compulsion every year from 2005 onwards. However one looks at the matter, the decision of the Federal Court judge allows the Minister to compel BP Canada to self-audit.

- *The impact on financial reporting*

[86] Another part of the context surrounding subsection 231.1(1) is the existence of financial reporting obligations under provincial securities legislation. These impose on publicly-traded corporations and their subsidiaries a disclosure obligation to ensure that the financial statements they issue for public consumption are reliable and accurately reflect their financial situation. By

enacting subsection 231.1(1), Parliament could not have intended to vest the Minister with a power so sweeping that it would undermine those obligations. The Federal Court judge erred in finding that these concerns were not relevant to the matter before him (Reasons, para. 29).

[87] In this respect, the intervener asserts that general and unrestricted access to TAWPs, if authorized, would be "in direct confrontation with the CPAs' ability to perform financial statement audits because they may not have access to all the required information" (Intervener's Memorandum, para. 49). Specifically, publicly-traded corporations would, as a direct consequence, tend to refrain from documenting issues for their external auditors and be less candid in disclosing their tax risks (Intervener's Memorandum, paras. 33-38). Inducing less disclosure of tax risks to auditors is detrimental to Canadians, be they individuals, corporations or governments, as it necessarily results in less protection by reason of the decreased reliability of financial statements.

[88] The Minister takes issue with the intervener's contention that the general and unrestricted access to TAWPs authorized by the Federal Court judge will have a negative impact on financial reporting. The Minister invites us to consider the U.S. experience which shows that ongoing access to TAWPs by the IRS has had no such effect.

[89] The Minister first refers to *Arthur Young* where the U.S. Supreme Court refused to recognize an accountant-client privilege with respect to TAWPs. In deciding against the recognition of such a privilege, the U.S. Supreme Court observed that the integrity of the securities markets would not suffer, highlighting the fact that the obligation vested on

independent auditors to serve the public interest assures that integrity will be preserved (*Arthur Young*, at pp. 818-821). The Minister invites us to make the same observation in this case.

[90] However, the Minister fails to note that *Arthur Young* dealt with an audit which turned into a criminal investigation when a questionable payment came to light. That is the context in which a summons was issued against Arthur Young to compel the production of the TAWPs that were relevant to the payment under investigation.

[91] One can easily see why the U.S. Supreme Court did not believe that allowing the investigator to have access to the TAWPs, in the context of a criminal investigation into a specific payment, would have a damaging effect on the work of independent auditors generally.

[92] The Minister also relies on the majority decision of the U.S. Court of Appeals for the First Circuit in *Textron* where it was also held that providing access to TAWPs would not suppress the disclosure of information to external auditors.

[93] However, the Minister fails to note that this decision which was rendered in 2009 makes clear that the IRS does not "automatically" request the production of TAWPs. Indeed, it is explained that the IRS only seeks the production of TAWPs where the taxpayer can be shown to have engaged in designated transactions that have been recognized as abusive and that "[o]nly a limited number of transactions have been so designated" (*Textron*, footnotes 1 and 2).

[94] Again, one can see why, having regard to this regulated scheme, the majority in *Textron* was satisfied that allowing access to Textron's TAWPs would not impact negatively on financial reporting generally.

[95] If anything, the U.S. experience which can be gleaned from these two cases confirms that general and unrestricted access to TAWPs would have a negative impact on financial reporting and impose on taxpayers an obligation which they do not have. The regulated approach referred to in *Textron* speaks to that in clear terms as there is no other explanation for the limits which this system imposes on the IRS' power to access TAWPs (I.R.C., § 6011 and 6112; Treas. Reg. § 1.6011-4; Treas. Reg. § 1.6012-2).

[96] I accept the intervener's argument that legislation cannot be construed in a vacuum, and that the legal context, including the laws of the provinces, can inform the use to which subsection 231.1(1) can be put. The Supreme Court addressed the matter as follows in *Giffen (Re),* [1998] 1 S.C.R. 91, 155 D.L.R. (4th) 332 in a bankruptcy context (para. 64):

> Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the [*Bankruptcy and Insolvency Act*] is dependent on provincial property and civil rights legislation in order to inform the terms of the [*Bankruptcy and Insolvency Act*] and the rights of the parties involved in the bankruptcy. Section 72(1) of the [*Bankruptcy and Insolvency Act*] contemplates interaction with provincial legislation.

(To the same effect, see *Will-Kare Paving & Contracting Ltd. v. Canada,* 2000 SCC 36, [2000] 1 S.C.R. 915 at para. 31; *Markevich v. Canada,* 2003 SCC 9, [2003] 1 S.C.R. 94 at para. 14.)

[97] I recognize that we are not dealing here with a word in a federal statute which takes its meaning from provincial laws. Rather, we are dealing with a power created under federal legislation that was not intended to ride roughshod over provincial laws. The issue is one of harmonious interpretation: Parliament intended its laws to work with provincial laws, not against them.

[98] Although raising taxes pursuant to subsection 91(3) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, is a federal matter, in granting the Minister broad access to documents pursuant to subsection 231.1(1) of the Act, Parliament cannot have intended that this power be used to imperil the integrity of the financial reporting system put in place by the provinces.

[99] I therefore conclude that the Minister cannot invoke subsection 231.1(1) for the purpose of obtaining general and unrestricted access to those parts of BP Canada's Tax Reserve Papers which reveal its uncertain tax positions. In practical terms, this means that the Minister cannot enlist taxpayers who maintain TAWPs to perform the core aspect of audits conducted under the Act.

- *The exercise of discretion*

[100] Given this conclusion, I need not address the question whether the Federal Court judge properly exercised his discretion in granting the relief claimed by the Minister. However, I believe it useful to address one aspect of this debate as it is intimately connected with the above discussion.

[101] Before the Federal Court judge, the appellant took the position that even if subsection 231.1(1) of the Act authorizes the Minister to access BP Canada's uncertain tax positions, he should not have ordered this information to be produced because the Minister was seeking a relief that was contrary to published policy.

[102] The Federal Court judge dismissed this argument based on his reading of the policy. In his view, the Minister, by bringing the application, was "adhering to, and implementing the policy that, without restriction, [TAWPs] are compellable under the *Act*" (Reasons, para. 29).

[103] With respect, this turns the policy on its head. I agree with the appellant that the policy, as it presently stands, states that the power to access TAWPs, although available to the Minister, will not be used routinely. This is what the words say (see paragraph 21 above) and when regard is had to the tension which the policy was intended to address, they cannot be read otherwise (Appeal Book, vol. IV, pp. 469-470, 472-489 and 498-499).

[104] Therefore, the Federal Court judge erred when he held that the unrestricted and ongoing access to BP Canada's Tax Reserve Papers was consistent with the Minister's policy (Reasons, para. 29).

[105] For the reasons already expressed, my view is that the policy reflects the very constraint which the Act imposes on the Minister so that the Federal Court judge had no choice but to adhere to it. If I am wrong in this regard, it remains that the Minister acted in defiance of published policy by seeking routine access to BP Canada's uncertain tax positions.

[106] Given the public interest imperative behind this policy, the Federal Court judge ought not to have exercised his discretion in favour of granting this remedy.

**DISPOSITION**

[107] For these reasons, I would allow the appeal with costs, and giving the order which the Federal Court judge should have given, I would dismiss the application brought by the Minister pursuant to subsection 231.7(1) of the Act, with costs.

"Marc Noël"
Chief Justice

"I agree
Stratas J.A."

"I agree
Boivin J.A."

**APPENDIX**

| ***Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.)** | ***Loi de l'impôt sur le revenu*, L.R.C. 1985, c. 1 (5e suppl.)** |
|---|---|
| **Records and books** | **Livres de comptes et registres** |
| **230.(1)** Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined | **230.(1)** Quiconque exploite une entreprise et quiconque est obligé, par ou selon la présente loi, de payer ou de percevoir des impôts ou autres montants doit tenir des registres et des livres de comptes (y compris un inventaire annuel, selon les modalités réglementaires) à son lieu d'affaires ou de résidence au Canada ou à tout autre lieu que le ministre peut désigner, dans la forme et renfermant les renseignements qui permettent d'établir le montant des impôts payables en vertu de la présente loi, ou des impôts ou autres sommes qui auraient dû être déduites, retenues ou perçues. |
| … | […] |
| **Inspections** | **Enquêtes** |
| **231.1.(1)** An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act, | **231.1.(1)** Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois : |
| **(a)** inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, | **a)** inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi |
| … | […] |
| **(b)** examine property in an inventory of a taxpayer and any property or | **b)** examiner les biens à porter à l'inventaire d'un contribuable, ainsi |

process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

and for those purposes the authorized person may

à ces fins, la personne autorisée peut :

**(c)** subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

**c)** sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou devraient l'être des livres ou registres;

**(d)** require the owner or manager of the property or business and any other person on the premises or place to give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

**d)** requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

…

[…]

**Requirement to provide documents or information**

**231.2.(1)** Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with

**Production de documents ou fourniture de renseignements**

**231.2.(1)** Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité

another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

**(a)** any information or additional information, including a return of income or a supplementary return; or

**(b)** any document.

**Compliance order**

**231.7.(1)** On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

**(a)** the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

**(b)** in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

**Definitions**

**232.(1)** In this section,

*solicitor-client privilege* means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this

fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

**a)** qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

**b)** qu'elle produise des documents.

**Ordonnance**

**231.7.(1)** Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

**a)** la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

**b)** s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

**Définitions**

**232.(1)** Les définitions qui suivent s'appliquent au présent article.

*privilège des communications entre client et avocat* Droit qu'une personne peut posséder, devant une cour supérieure de la province où la question a pris naissance, de refuser de divulguer une communication orale ou documentaire pour le motif que celle-ci est une communication entre elle et son avocat en confidence professionnelle sauf que, pour

section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication. (*privilège des communications entre client et avocat*)

l'application du présent article, un relevé comptable d'un avocat, y compris toute pièce justificative ou tout chèque, ne peut être considéré comme une communication de cette nature. (*solicitor-client privilege*)

**Examination of certain documents where privilege claimed**

**(3.1)** Where, pursuant to section 231.1, an officer is about to inspect or examine a document in the possession of a lawyer or where, pursuant to section 231.2, the Minister has required provision of a document by a lawyer, and the lawyer claims that a named client or former client of the lawyer has a solicitor-client privilege in respect of the document, no officer shall inspect or examine the document and the lawyer shall

**Secret professionnel invoqué lors de l'examen de documents**

**(3.1)** Lorsque, conformément à l'article 231.1, un fonctionnaire est sur le point d'inspecter ou d'examiner un document en la possession d'un avocat ou que, conformément à l'article 231.2, le ministre exige la fourniture ou la production d'un document, et que l'avocat invoque le privilège des communications entre client et avocat en ce qui concerne le document au nom d'un de ses client ou anciens clients nommément désigné, aucun fonctionnaire ne peut inspecter ou examiner le document et l'avocat doit:

**(a)** place the document, together with any other document in respect of which the lawyer at the same time makes the same claim on behalf of the same client, in a package and suitably seal and identify the package or, if the officer and the lawyer agree, allow the pages of the document to be initialed and numbered or otherwise suitably identified; and

**a)** d'une part, faire un colis du document ainsi que de tout autre document pour lequel il invoque, en même temps, le même privilège au nom du même client, bien sceller ce colis et bien le marquer, ou, si le fonctionnaire et l'avocat en conviennent, faire en sorte que les pages du document soient paraphées et numérotées ou autrement bien marquées;

**(b)** retain it and ensure that it is preserved until it is produced to a judge as required under this section and an order is issued under this section in respect of the document.

**b)** d'autre part, retenir le document et s'assurer de sa conservation jusqu'à ce que, conformément au présent article, le document soit produit devant un juge et une ordonnance rendue concernant le document.

| *Federal Courts Rules,* **S.O.R./98-106** | *Règles des Cours fédérales,* **D.O.R.S./98-106** |
|---|---|
| **Marking of confidential material** | **Identification des documents confidentiels** |
| **152.(1)** Where the material is required by law to be treated confidentially or where the Court orders that material be treated confidentially, a party who files the material shall separate and clearly mark it as confidential, identifying the legislative provision or the Court order under which it is required to be treated as confidential. | **152.(1)** Dans le cas où un document ou un élément matériel doit, en vertu d'une règle de droit, être considéré comme confidentiel ou dans le cas où la Cour ordonne de le considérer ainsi, la personne qui dépose le document ou l'élément matériel le fait séparément et désigne celui-ci clairement comme document ou élément matériel confidentiel, avec mention de la règle de droit ou de l'ordonnance pertinente. |
| … | […] |
| **Order to continue** | **Durée d'effet de l'ordonnance** |
| **(3)** An order made under subsection (1) continues in effect until the Court orders otherwise, including for the duration of any appeal of the proceeding and after final judgment. | **(3)** L'ordonnance rendue en vertu du paragraphe (1) demeure en vigueur jusqu'à ce que la Cour en ordonne autrement, y compris pendant la durée de l'appel et après le jugement final. |

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-385-15 |
| **STYLE OF CAUSE:** | BP CANADA ENERGY COMPANY v. MINISTER OF NATIONAL REVENUE v. CHARTERED PROFESSIONAL ACCOUNTANTS OF CANADA |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 21, 2017 |
| **REASONS FOR JUDGMENT BY:** | NOËL C.J. |
| **CONCURRED IN BY** | STRATAS J.A.<br>BOIVIN J.A. |
| **DATED:** | MARCH 30, 2017 |

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| | |
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