

Federal Court



Cour fédérale

Date: 20150423

Docket: T-1272-14

Citation: 2015 FC 524

Ottawa, Ontario, April 23, 2015

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

**REVCON OILFIELD CONSTRUCTORS
INCORPORATED**

Respondent

ORDER AND REASONS

I. BACKGROUND

[1] This is a summary application commenced by the Minister under section 231.7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the Act]. The Minister sought a compliance order in respect of Requests for Information issued to the Respondent on April 11, 2013 and October 25, 2013.

[2] The Respondent, Revcon, is an Alberta corporation incorporated in 2006. Messrs Christian Billesberger and David Szatkowski are its directors. The Canada Revenue Agency [CRA] is auditing Revcon with regard to a corporate restructuring which occurred between November 7 and December 31, 2011. In communications and meetings with the CRA, the Respondent took the position through counsel, then Mr Lyndon Thiessen, that the requested information [the Retained Documents] is subject to solicitor-client privilege and need not be disclosed.

[3] When the matter came on for hearing at the General Sittings of the Court at Edmonton on July 14, 2014, counsel for the Respondent, then Mr Douglas J Forer, again asserted solicitor-client privilege with respect to the information sought by the Minister. As a result, an Order was issued setting a schedule for the service and filing of documents to be completed by February 16, 2015. Furthermore, the parties were to request a special hearing no later than March 31, 2015.

[4] The Respondent filed and served the affidavit of Christian Billesberger sworn on August 29, 2014. Mr Billesberger is the Secretary-Treasurer of the Respondent and one of its Directors. In this affidavit, Mr Billesberger divides the Retained Documents into three categories. The specific items within each category are set out in three schedules to his affidavit: Schedule A, Schedule B and Schedule C.

[5] The Billesberger affidavit provides four distinct rationales for claiming privilege over the information in the three schedules.

[6] First, privilege is claimed over items that would identify Law Firm X, an undisclosed law firm which was retained by the Respondent's counsel for the purposes of the restructuring transactions being audited [the Law Firm X claim].

[7] Second, privilege is claimed over items which include "shorthand tax law language used by Law Firm X that describes the Transactions in a manner that could potentially be prejudicial to the Respondent's interests" [the Nomenclature claim].

[8] Third, privilege is claimed over items which include Law Firm X's opinion respecting the transactions or the work product of Law Firm X's legal retainer [the Structuring claim].

[9] Fourth, privilege is claimed over items which were communications for the purpose of obtaining legal advice or assistance [the Legal Advice claim].

[10] Counsel for the Applicant cross-examined Mr Billesberger on October 8, 2014 and filed an additional reply on January 15, 2015. On the date of the scheduled hearing (March 19, 2015), the Respondent filed a Record consisting of Mr Billesberger's affidavit, a five page Memorandum of Fact and Law and a List of Authorities consisting of excerpts from academic texts and two decisions: *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 and *Thompson v Canada (Minister of National Revenue)*, 2013 FCA 197.

[11] When the matter came on for hearing on March 19, 2015, counsel for the Respondent acknowledged that his client was not in compliance with the July 14, 2014 scheduling Order.

Aside from being out of time to file any additional material, the Respondent had failed to provide the names of the senders and recipients of many of the Retained Documents as required by the July 14, 2014 Order. Counsel conceded that he had no authorities to submit in support of several of the rationales advanced in the Billesberger affidavit. He urged that the Court accede to the Applicant's request for alternate relief – namely, that the Court review the actual documents to determine whether any of them contain privileged information.

[12] The Court has the power to receive documents for which solicitor-client privilege is asserted in a sealed envelope and review them so as to determine whether a proper claim of privilege has been made out. In *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 17 [*Blood Tribe*], Justice Binnie explained that this power ought to be used sparingly: “Even courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue...”

[13] In this instance, the Court was not satisfied that it had sufficient evidence or argument to decide the issue fairly. In the absence of any objection from the Applicant and in the interests of proceeding with prudence, the Court agreed to review the documents. An Order to that effect was issued on March 24, 2015.

[14] On March 31, 2015 counsel for the Respondent forwarded two boxes of documents under seal loosely organized into Sections “A”, “B” and “C”, corresponding to the schedules attached to the Billesberger affidavit. The Court notes that this material does not appear to be a complete

response to the information requests but, rather, merely that for which the privilege claims are maintained.

II. ISSUES:

[15] The sole issue before the Court is whether the Retained Documents are subject to solicitor-client privilege. There is no issue as to whether the Applicant has satisfied the conditions that must be established under subsection 321.7 (1) of the Act before the Court may order compliance. In particular, it is clear that the Respondent was required under sections 231.1 or 231.2 to provide access, assistance, and information or documents to the CRA and failed to do so. If the claims of privilege are without merit, there is no obstacle to issuing a compliance order.

III. LEGAL FRAMEWORK:

[16] Section 231.7 of the Act explicitly protects documents or information covered by solicitor-client privilege. The Act defines “solicitor-client privilege” at subsection 232(1).

“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 section an accounting record of a lawyer, including any supporting voucher or cheque, shall be

« 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 confiance professionnelle sauf que, pour l’application du présent article, un relevé comptable d’un avocat, y compris toute pièces

deemed not to be such a communication.

justificative out tout chèque, ne peut être considéré comme une communication de cette nature.

[17] Solicitor-client privilege attaches to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer, as opposed to acting as a business counsellor or in some other non-legal capacity: *Blood Tribe*, above, at para 10.

[18] In order to uphold a claim of solicitor-client privilege, a court must determine (1) that legal advice has been sought from a professional legal adviser in her capacity as such, (2) that the communications relate to that purpose and (3) that the communications were made in confidence by the client and the solicitor. See *Descôteaux et al v Mierzwinski*, [1982] 1 SCR 860 at 892-893:

In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.

[Emphasis added]

[19] The onus to establish that the Retained Documents fall within the scope of solicitor-client privilege is on the Respondent. In *Belgravia Investments Limited v Canada*, 2002 FCT 649

[*Belgravia*], Justice Heneghan wrote at paras 47-48:

The party asserting privilege carries the evidentiary burden. The Applicants must show, on a balance of probabilities, that the documents in question are a communication between a solicitor

and a client that involves the seeking or giving of legal advice, and that the parties intend to be confidential. [...]

The party claiming the privilege must do more than baldly assert the privilege.

[20] Tax planning communications are not privileged. Also, facts that exist independently of a communication are not privileged: *Belgravia*, above, at paras 44-45.

[21] In *Canada (National Revenue) v Kitch*, 2003 FCA 307 at paras 35-47, the Federal Court of Appeal affirmed that there is no such thing as “accountant-client privilege”. Advice given by an accountant (or, I would add, by a lawyer for accounting or tax planning purposes) does not fall within the scope of solicitor-client privilege: *Canada (National Revenue) v Grant Thornton*, 2012 FC 1313 at para 22.

[22] This understanding of the scope of the privilege was reiterated by Justice Binnie in *Blood Tribe*, above, at para 10:

While the solicitor-client privilege may have started life as a rule of evidence, it is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity...

[Emphasis added]

[23] Moreover, the client may waive the privilege and authorize the release of the communications to a third party. In such instances, the communications are no longer privileged:

see e.g. *Taxpro Professional Corporation v Canada (National Revenue)*, 2011 FC 224 at para 32, aff'd 2011 FCA 306.

IV. **ANALYSIS:**

[24] In this instance, it is clear that the Respondent shared some of the Retained Documents with accountants and commodity traders. There is nothing in the record before the Court to suggest that these individuals are anything other than third parties. Privilege does not attach to communications shared with such persons.

[25] The Respondent has provided me with no authority to support the proposition that the Law Firm X and Nomenclature claims are valid bases upon which to claim solicitor-client privilege. The idea that the identity of a law firm or lawyer retained by a client to provide tax planning advice is privileged finds no support in the law. It does not matter whether the law firm was retained “indirectly” by another firm directly retained by the client. A communication revealing the name of a law firm or lawyer – without anything else, such as actual legal advice – is not a confidential communication made for the purpose of receiving legal advice from a lawyer acting in a legal capacity. The name of a law firm, without more, is not protected by solicitor-client privilege. Nor is the revelation of shorthand tax language used by tax planning advisors.

[26] During the cross-examination, Mr Billesberger claimed to have not seen most of the Retained Documents over which he had baldly asserted privilege in his affidavit. He claimed to lack knowledge of the list of transactions and statements of account that the CRA was interested

in, and of communications other than the emails under Schedule B which included him in the recipient or “cc” field. With respect to the majority of the Retained Documents, Mr Billesberger’s evidence amounted to little more than opinion, speculation or hearsay, since he said he not have firsthand knowledge of their content when swearing the affidavit. This is insufficient to ground a claim of privilege.

A. *Schedule “A” claims*

[27] Included in the material submitted to the Court under seal are two Closing Books (in three-ring binders) prepared for transactions undertaken by the Respondent, dated December 8 and 9 and December 20, 2011. There are also two CD-ROMs with electronic copies of the same material. Mr Billesberger averred that a claim of solicitor-client privilege was made for and on behalf of the Respondent with respect to the contents of the Closing Book for December 8 and 9, 2011 and the associated CD-ROM. No reference is made in Mr Billesberger’s affidavit to the December 20, 2011 Closing Book and the associated CD-ROM.

[28] The Closing Book binder for the December 8 and 9, 2011 transactions contains a three page index describing 24 documents to be found at sequentially numbered tabs. Two documents, described as CRA forms to be found at tabs 3 and 6 in the index, are not included.

[29] The index is followed by a 12 page letter dated December 22, 2011 from Douglas J Forer of the McLennan Ross LLP law firm to the attention of Lyndon Thiessen of the Ritchie Mill Law Office, on behalf of 1239744 Alberta Ltd, with respect to a series of share transactions involving that company and 1239749 Alberta Ltd. The letter includes legal advice with regard to the

income tax reporting requirements and tax consequences of the transactions for named individuals.

[30] Attached as Appendix “A” is a description of terms employed in the reporting letter and a statement that McLennan Ross LLP’s clients in the matter are 1239749 Alberta Ltd, 1239744 Alberta Ltd, David Szatkowski, Nicole Bauman and Christian Billesberger, and that Craig McDonald, Chartered Accountant, is their agent, and that Ritchie Mill Law Office, c/o Lyndon Thiessen, is their counsel for the purposes of receiving solicitor-client privileged material.

[31] Also attached as Appendix “B” is a statement of “Facts and Assumptions” relating to the share structure and ownership of the two numbered Alberta corporations. Immediately following the statement in Appendix “B” are three pages of charts illustrating the corporate structure of the two numbered Alberta corporations and Revcon before and after the December 8 and 9, 2011 transactions.

[32] The December 22, 2011 letter from Mr Forer with appendices “A” and “B” is privileged. It is not clear whether the corporate structure charts were part of Mr Forer’s letter or are otherwise privileged as legal work product. The Court is satisfied that they should be treated as such out of an abundance of caution.

[33] The remaining documents at the tabs numbered 1 through 24 of the Closing Book are corporate board resolutions, shareholder agreements, share conversion agreements, share purchase agreements, and other such corporate instruments. None of them are communications

between a client and a lawyer intended to be made or received for the purpose of obtaining legal advice. They are evidence, rather, of completed corporate transactions related to the restructuring scheme. Therefore, they are not privileged. Similarly, the three page index is not privileged as it merely describes the contents of the binder.

[34] The Closing Book dated December 20, 2011 contains a nine page index and 69 numbered tabs containing documents relating to a series of transactions by Revcon and other corporate entities between November 4 and December 5, 2011. None of this material is privileged. I note that tabs 23 and 31 include information on transfers from or between a lawyer's trust accounts. Such information is not privileged: *Canada (Minister of National Revenue) v Reddy*, 2006 FC 277. Tabs 49 and 51 contain information that was already sent to the CRA.

[35] As noted above, the two CD-ROM disks appear to contain the same information as the Closing Books. The same findings regarding privilege apply to their content.

B. Schedule "B" claims

[36] The Schedule "B" claims relate to a series of messages from the email accounts of Christian Billesberger and Dave Szatkowski (also a Director of Revcon). The messages are to and from Monica Surgenor (Revcon's Office Manager), Douglas Forer, Lyndon Thiessen and several other persons including Craig MacDonald, a Chartered Accountant. There is considerable duplication as the same strings of messages appear to have been retained in several email accounts. Most of the messages relate to transactional matters and are not communications for the purpose of obtaining or receiving legal advice.

[37] Mr Billesberger claimed solicitor-client privilege with respect to these emails in relation to the Law Firm X Claim and Nomenclature Claim. As explained above, there is no basis in law to support these arguments. The Court rejects, therefore, the claims respecting the redactions under the headings “Source”, “Recipient” and “C.C.” and “Subject” in the columns set out in Schedule “B” to Mr Billesberger’s affidavit.

[38] In addition, Mr Billesberger claimed privilege over communications for the purpose of obtaining legal advice or assistance for the Respondent in respect of the Applicant’s audit of the transactions “and related matters” and, generally, for the Structuring Claim.

[39] Having read the emails provided to the Court on March 31, 2015 and loosely organized under the heading “B”, the Court is satisfied that the following contain communications for the purpose of obtaining legal advice and are, therefore, privileged.

- July 26, 2011 (from Surgenor to Thiessen; re “Revcon Corporate Assessment”)
- July 27, 2011 (reply from Thiessen to Surgenor, Billesberger and Szatkowski re “Revcon Corporate Assessment”)
- July 30, 2011 (from Szatkowski to Thiessen with copies to Surgenor and Billesberger and reply from Thiessen, re “Revcon expenses and Commodity Acct”)
- August 19, 2011 (from Forer to Billesberger, Szatkowski and Thiessen, re “Commodities Straddle”)
- August 22-23, 2011 (series of messages from Billesberger to Thiessen, Forer, Szatkowski and Pam Felske re “Canadian Business operating in the US” and replies)
- August 23, 2011 (from Forer to Billesberger, Szatkowski and Thiessen re “Loss corporation” and reply from Szatkowski)
- September 19, 2011 (Billesberger to Thiessen, Forer, Szatkowski and Surgenor re “Update”)
- September 22, 2011 (Forer to Billesberger and Thiessen re “Lossco Chart”)
- October 21, 2011 (series of messages to and from Billesberger, Forer, Szatkowski, Thiessen and other persons re “CWB Loan to Revcon Oilfield”)
- November 14, 2011 (from Szatkowski to Thiessen, Billesberger and Surgenor, re “partnerships”)
- November 22, 2011 (from Billesberger to Forer and reply from Forer to Billesberger, Szatkowski and Thiessen re “Documents for Transactions”)

- December 15, 2011 (from Forer to Thiessen, Billesberger and Szatkowski re the Reporting Letter and related documents)
- January 25, 2012 (from Forer to Billesberger and Szatkowski re “Rev Can”)
- January 25, 2012 (a series of messages from Forer to Billesberger and Szatkowski re “Canada Revenue Agency”)
- January 30, 2012 (from Forer to Szatkowski, Billesberger and Thiessen re “Tomorrows meeting”)
- January 30, 2012 (from Forer to Szatkowski, Billesberger and Thiessen)
- November 13, 2012 (from Thiessen to Surgenor, Billesberger and Szatkowski re “CRA audit continued”)
- November 26, 2012 (from Thiessen to Surgenor, Szatkowski and Billesberger re “CRA audit”)

[40] The other email communications are not privileged and shall be disclosed to the Applicant. I note, in passing, that Mr Billesberger’s professed lack of knowledge on cross-examination is surprising given the extent to which he was an initiator or recipient of communications relating to these transactions.

C. Schedule “C” Claims

[41] This package contains reporting letters and statements of account from the Ritchie Mill Law Office, McLennan Ross LLP and several other law firms involved in structuring the transactions relating to the shares of the two numbered Alberta corporations and Revcon in 2011 and 2012. The reporting letters from the law firms are privileged as they contain legal advice relating to the tax obligations of Revcon’s Directors and shareowners arising from the structuring arrangements. Since *Maranda v Richer*, 2003 SCC 67, the courts have protected information regarding the fees to be paid for legal advice. Accordingly, the statements of account are also privileged.

[42] A letter dated January 19, 2012 from Douglas Forer of McLennan Ross to the attention of Pam Felske of the Ritchie Mill Law Office is not privileged as it merely transmits the corporate minute book for 1538893 Alberta Ltd, a share purchase agreement between several corporate entities respecting the purchase and sale of Class “A” common shares in Revcon, and a copy of a minute book for 6251471 Canada Inc received from an Ottawa law firm.

[43] Subject to these findings, the application will be granted with costs.

V. **CONCLUSION:**

[44] I am satisfied that the Applicant requires the information and documents requested on April 11, 2013 and October 25, 2013 for purposes related to the administration and enforcement of the Act, and to conduct an audit of the Respondent under the Act. It is clear that the Respondent has not provided all of the information and documents sought by the Minister as described in the requests for information. It is not clear that the material submitted to the Court on March 31, 2015 for review of the privilege claims constitute a complete response to the information requests.

[45] The claims of privilege initially made by Mr Thiessen on behalf of the Respondent in meetings with CRA and reiterated by Mr Billesberger in his affidavit of August 29, 2014 were overly broad. The grounds advanced in support of the claims were largely unfounded and unsupported by any legal authority. This was made abundantly clear in the scant record submitted by the Respondent and in the oral representations of Mr Forer at the hearing on March 19, 2015.

[46] Accordingly, an Order shall issue requiring the Respondent to provide the information and documents requested by the Applicant within 30 days of service of a copy of the Order

VI. **COSTS:**

[47] The Applicant submitted a Bill of Costs for the fees and disbursements incurred in preparing for and attending at the March 19, 2015 hearing. Counsel for the Respondent agreed at the hearing that the amounts claimed were reasonable subject to an adjustment for the time not required at that hearing. Accordingly, I will reduce the number of units for that appearance from 2 to 1 and the total claimed for counsel fees by \$140.00. The total amount for fees and disbursements awarded will be \$3,089.12.

ORDER

IT IS THE ORDER OF THE COURT that:

1. the application is granted;
2. subject to the Court's findings of solicitor-client privilege as set out in its Reasons, the Respondent shall provide the Information and Documents requested by the Applicant on April 11, 2013 and October 25, 2013, within 30 days after being served with a copy of this Order, to Jan Walker of the Canada Revenue Agency, Edmonton Tax Services Office, Suite 10, 9700 Jasper Avenue, Edmonton, Alberta, T5J 4C8, or some other officer who may be identified for that purpose; and
3. Costs of this application are awarded to the Applicant in the amount of \$3,089.12.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1272-14

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v REVCON
OILFIELD CONSTRUCTORS INCORPORATED

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: MARCH 19, 2015

ORDER AND REASONS: MOSLEY J.

DATED: APRIL 23, 2015

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