

Docket: 2008-922(GST)G

BETWEEN:

GLOBAL CASH ACCESS (CANADA) INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on July 14, 2010, at Toronto, Ontario

By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Dalton J. Albrecht
Counsel for the Respondent: Annie Paré

ORDER

UPON motion by the Appellant for an Order directing the Respondent to provide to the Appellant an unredacted copy of a memorandum dated December 11, 2003, and for costs of this motion;

AND UPON reading the material filed herein;

AND UPON hearing counsel for the parties;

IT IS ORDERED THAT:

1. the respondent shall produce to the appellant, within 15 days of receipt of this Order, a copy of the December 11, 2003 memorandum on which only the fourth to the seventeenth lines, inclusive, of page 2 are redacted;

2. the Registry shall return the envelopes containing the opinions and the unredacted memorandum to counsel for the respondent; and
3. the appellant shall pay to the respondent costs of the motion forthwith, in any event of the cause, which costs are fixed at \$1,000 inclusive of disbursements and H.S.T.

Signed at Ottawa, Canada, this 6th day of October, 2010.

“E.A. Bowie”

Bowie J.

Citation: 2010 TCC 493
Date: 20101006
Docket: 2008-922(GST)G

BETWEEN:

GLOBAL CASH ACCESS (CANADA) INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] The appellant brings this motion for an order requiring the respondent to produce to it an unredacted copy of a certain memorandum dated December 11, 2003, which was sent by Jocelyn Denis, Tax Appeals Directorate, Commodity Taxes Section, of the Canada Revenue Agency to Colin Cook, Chief of Appeals, Toronto North Taxation Services Office, of the Canada Revenue Agency. I shall refer to it throughout as “the memorandum”. To state the issue briefly, the respondent takes the position that the redactions from the copy of the memorandum which her counsel has produced “relate primarily to matters covered by solicitor-client privilege”, and are therefore protected from disclosure in the process of discovery. The appellant does not accept that this is so, and brings this motion to have the matter decided by the Court.

[2] The background to the motion is both lengthy and fraught with overtones of the sort of incivility that in recent years has been of concern to the judiciary, the law societies and the Advocates’ Society. In a letter of September 16, 2009 counsel for the appellant asked that counsel for the respondent produce the memorandum. Its existence had become known to the appellant because it was mentioned in one of the respondent’s productions. Considerable correspondence was exchanged by counsel on the subject, and on February 17, 2010 counsel for the respondent sent the redacted

copy of the memorandum to counsel for the appellant. On February 26 counsel for the appellant wrote, saying in part:

... we do not agree with the Crown's position that the redacted portions of the Memorandum are protected by solicitor client privilege.

It was in this letter that counsel for the appellant first indicated the intention to bring this motion to force production of an unredacted copy. It appears that it was in an email sent on April 1, 2010 that counsel for the respondent first took the position that the redacted portions of the memorandum are not only protected by privilege, but are "in any event, irrelevant". Further correspondence ensued, with counsel for the respondent on April 14 saying, apparently for the first time, that the redacted portions of the document summarize the content of a legal opinion given by the Department of Justice to the Canada Revenue Agency.

[3] On June 18, 2010 the appellant filed this motion. Between them the parties have filed competing affidavit material some 3 centimeters thick to advance their respective views of the facts. Most of it consists of the correspondence between counsel and has little to do with the merits of either party's case. It seems to have been reproduced only to advance the arguments in respect of costs.

[4] The position of counsel for the appellant is that the memorandum is simply a communication between two employees of the Canada Revenue Agency, and that no privilege attaches to that. The respondent's position is that the redacted portion of the document consists of legal advice, given in confidence, by a lawyer in the Department of Justice to officers of the Canada Revenue Agency. That advice, she says, is privileged, and it remains privileged when it is passed from one officer of the Agency to another as part of their internal correspondence.

[5] At the hearing, an unredacted copy of the memorandum was given to me in a sealed envelope by counsel for the respondent. She also provided, in a separate sealed envelope, copies of the communications between the Agency and the Department of Justice. I have reviewed these, and there is no doubt that the greatest part of the redactions in question comprises the substance of the legal advice that was given in confidence by a lawyer in the Department of Justice to an officer of the Canada Revenue Agency. The advice was given to the Agency under the protective cloak of solicitor client privilege, and it does not lose that protection when it is passed from one officer of the Agency to another. If support for that proposition, other than common sense, is required, it may be found in the judgment of Halvorson J. in

*International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co.*¹

[6] I have said that the greatest part of the redaction remains subject to the privilege and so not subject to production. There are, however, some parts of the redaction that do not satisfy the requirements of solicitor-client privilege. This seems to have been recognized early in the dispute, when counsel for the respondent wrote that the redactions relate **primarily** to matters subject to the privilege. The part that contains the opinion that is protected by privilege is that which begins with the fourth line on page 2 of the memorandum and ends immediately above the heading TAX APPEALS DIRECTORATE POSITION. The remainder of the redactions, although they make reference in places to the opinion, do not contain the substantive advice and are not subject to privilege. The respondent shall, within 15 days of receipt of this Order, produce to the appellant a copy of the memorandum on which only fourth to the seventeenth lines, inclusive, of page 2 are redacted.

[7] Both parties argued strenuously for substantial costs of the motion. Success is divided, although it is difficult to see of what practical use the limiting of the redactions will be to the appellant. Indeed, it is difficult to see of what practical use the memorandum, redacted or not, could be to the appellant in the litigation. Motions of this kind should not be encouraged. The Respondent shall have costs of the motion, which I fix at \$1,000, payable forthwith, in any event of the cause.

Signed at Ottawa, Canada, this 6th day of October, 2010.

“E.A. Bowie”

Bowie J.

¹ [1990] S.J. 615; 89 Sask R. 1 (Sask. Q.B.).

CITATION: 2010 TCC 493

COURT FILE NO.: 2008-922(GST)G

STYLE OF CAUSE: GLOBAL CASH ACCESS (CANADA)
INC. and HER MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 14, 2010

REASONS FOR ORDER BY: The Honourable Justice E.A. Bowie

DATE OF ORDER: October 6, 2010

APPEARANCES:

Counsel for the Appellant:	Dalton J. Albrecht
Counsel for the Respondent:	Annie Paré

COUNSEL OF RECORD:

For the Appellant:

Name:	Dalton J. Albrecht
Firm:	Miller Thomson LLP

For the Respondent:

Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada
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