Docket: 2014-4504(IT)G

BETWEEN:

COOPERS PARK REAL ESTATE DEVELOPMENT CORPORATION,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion heard on June 12, 2023 at Toronto, Ontario

Before: The Honourable Justice Joanna Hill

Appearances:

Counsel for the Appellant:	Kristen Duerhammer Justin Kutyan
Counsel for the Respondent:	Michael Taylor Neva Beckie

ORDER

The Respondent's motion is granted, with costs in the cause. In accordance with the attached Reasons:

1. The Appellant is hereby ordered, within 60 days of this Order, to:

    a. Provide further and complete answers in writing to the following questions:

        - Question 283(17z)(a)
        - Question 283(17z)(b)

- Question 283(17cc)(d)
- Question 283(17vv)(a)
- Question 379(e)
- Question 299(f)

b. Provide a redacted copy of Document 1 / Tab 4(a), the September 3, 2004 engagement letter from Moskowitz & Meredith LLP to Concord Pacific Group Inc., Farris Vaughan Wills & Murphy (**Farris Law**), and KPMG LLP, to protect the information covered by solicitor-client privilege in the final paragraph of page 1 up to and including the four bullet points that continue on to page 2.

c. Provide unredacted copies of the following documents:

- Document 2 / Tab 4(b): September 3, 2004 Letter from KPMG LLP to Concord Pacific Group Inc. re confidentiality procedures.
- Document 3 / Tab 4(c): September 7, 2004 Letter from KPMG LLP to Adex Industries Inc. re confidentiality procedures.
- Document 4 / Tab 5: September 14, 2004 Draft Infowave Inversion Strategy diagrams with handwritten notes.
- Document 5 / Tabs 4(e) and 22: Emails dated September 14, 15 and 16, 2004 between George Reznik, Infowave, Cliff McCracken, Concord Group, and Tony Tse, KPMG LLP.
- Document 6 / Tab 21: Email correspondence dated October 26, 2004 between Farris Law, KPMG LLP, and Infowave.
- Document 7 / Tab 6: November 1, 2004 Memorandum from Tony Tse, KPMG Accounting, to "The tax file of Farris Vaughan Wills & Murphy", copied to John Zaytsoff, KPMG LLP, and Mitchell Gropper, Farris Law.
- Document 8 / Tab 7: November 1, 2004 Memorandum from Tony Tse, KPMG LLP, to "The tax file of Farris Vaughan Wills &

Murphy", copied to John Zaytsoff, KPMG LLP, and Mitchell Gropper, Farris Law.

- Document 9 / Tab 20: November 3, 2004 Emails between Tony Tse, KPMG LLP, Mitchell Gropper, Farris Law, George Reznik, Infowave, and Ron Voyer, Ernst & Young.

- Document 10 / Tab 4(d): December 2, 2004 Letter from KPMG LLP to Adex Industries, signed by Adex Industries and Concord Pacific Group Inc. on December 3, 2004.

- Document 11 / Tab 8: December 3, 2004 Draft memorandum from KPMG LLP to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave", copied to John Zaystoff, KPMG LLP, and Mitchell Gropper, Farris Law.

- Document 12 / Tab 9: December 3, 2004 Draft memorandum from KPMG LLP to "The tax file of Farris Vaugh Wills & Murphy – Project Airwave", copied to John Zaystoff, KPMG Accounting & Mark Chu.

- Document 13 / Tab 1: December 19, 2004 Letter from KPMG LLP to Mitchell Gropper, Farris Law.

- Document 14 / Tab 2: December 19, 2004 Letter from KPMG LLP to Mitchell Gropper, Farris Law.

- Document 15 / Tab 12: January 5, 2005 Research memo from KPMG LLP to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave".

- Document 16 / Tab 3: March 15, 2005 Letter from John Zaystoff, KPMG LLP, to Mitchell Gropper, Farris Law.

- Document 17 / Tab 16: September 7, 2005 Draft letter from John Zaytsoff, KPMG LLP, to Mitchell Gropper, Farris Law, re: Coopers Park Partnership Structure.

- Document 18 / Tab 13: March 15, 2005 Draft letter from Tony Tse, KPMG LLP, to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave". Copied to Johns Zaytsoff, KPMG LLP, & Mitchell Gropper, Farris Law.

2. If necessary, the parties shall file an agreed timetable setting deadlines for the Respondent's service of final follow-up questions arising from new information contained in the answers and documents to be provided under section 1 of this Order and the Appellant's answers to the final follow-up questions, within 95 days of this Order.

Signed at Ottawa, Canada, this 20th day of September 2024.

"Joanna Hill"

Hill J.

Citation: 2024TCC122
Date: 20240920
Docket: 2014-4504(IT)G

BETWEEN:

COOPERS PARK REAL ESTATE DEVELOPMENT CORPORATION,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Hill J.

I. Introduction

[1] This is the second motion regarding the proper scope of discovery in this appeal. In 2022, the Court granted the Appellant's motion for an order requiring the Respondent to provide documents. The Court is now called upon to determine the Respondent's motion for an order requiring the Appellant to provide answers to outstanding questions, to make inquiries with and request production of documents from former third-party advisors, and to have the Court assess the Appellant's claim of solicitor-client privilege over certain documents.

[2] For the reasons that follow, the motion is granted in part. The Appellant is required to answer the majority of the disputed questions because they relate to the facts and issues in dispute in the appeal. Due to its failure to meet the evidentiary burden to support its claim of solicitor-client privilege, the Appellant also must disclose documents to the Respondent. However, the Appellant is not required to make inquiries with and request documents from its former third-party advisors, because the relevant *Tax Court of Canada Rules (General Procedure)* do not apply in the circumstances. The Appellant has already responded to the Respondent's questions in this regard.

II. Background

[3] The issue in the underlying appeal is the application of the general anti-avoidance rule (**GAAR**) to deny the Appellant over $68 million in losses, expenditures, and credits claimed in its 2007 through 2009 taxation years. The Minister of National Revenue alleges that the GAAR applies, based on transactions that took place between November 2004 and January 2005. The Appellant argues that none of those transactions were avoidance transactions within the meaning of the GAAR.

[4] Examinations for discovery began in 2021. Neither party was satisfied with the answers or documents provided during the initial virtual oral examinations, or with those provided in response to subsequent written questions, undertakings, and follow-up questions.

[5] As a result, both the Appellant and Respondent filed motions to be heard on the same day in May 2022. The Respondent withdrew its motion after receiving additional responses, documents, and information from the Appellant on April 22, 2022. The Court heard and granted the Appellant's motion, in part, by Order dated July 15, 2022 (**2022 Motion**).[1]

[6] The Respondent reviewed the Appellant's responses and asked further questions in this regard. They were not satisfied with the Appellant's additional responses, or its refusal to provide responses and make further inquiries. The Respondent therefore filed the present motion seeking the same relief as in 2022, but with respect to a smaller list of questions and documents.

[7] The Respondent seeks an order requiring the Appellant to:

1. Provide answers and documents in response to the questions and requests listed in Schedule "A" to the Respondent's Notice of Motion;

2. Make inquiries and request production of documents and records created by Ernst & Young and Canaccord Capital, the Appellant's advisors prior to the transactions at issue in the appeal, with respect to the applicable

[1] *Coopers Park Real Estate Development Corporation v HMTQ*, 2022 TCC 82.

questions and requests also listed in Schedule "A" to the Respondent's Notice of Motion;

3. With respect to 19 documents over which the Appellant claims solicitor-client privilege, produce documents that the Court determines are not protected by solicitor-client privilege and, if applicable, redacted copies of documents the Court determines are partially protected by solicitor-client privilege; and,

4. Re-attend and to answer all proper follow-up questions arising from the documents produced.

[8] In support of its motion, the Respondent relies on two affidavits sworn by Julie Wilson.[2] The Appellant relies on the Affidavit of Kristina Ilogon.

A. List of disputed questions

[9] The Respondent's Schedule "A" list broadly refers to the first questions asked in the initial round of discovery, even though some answers and follow-up questions were subsequently exchanged. To assist the Court, the Appellant provided a chart detailing the lengthy sequence of questions and answers in this regard.[3] The Respondent does not disagree with the accuracy of the chart, but takes issue with some of the characterizations in the Appellant's headings.

[10] For the purpose of these Reasons, I have numbered the disputed questions 1 through 11.

B. Documents to be reviewed for solicitor-client privilege

[11] Further to the agreement of the parties prior to the hearing, the Appellant provided the Court with a copy of the 19 documents at issue, under seal, for review to dispose of this motion.

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[2] The first sworn on March 4, 2022, initially filed in support of the March 2022 motion (**Wilson Affidavit #1**), and the second sworn on April 4, 2023 (**Wilson Affidavit #2**).

[3] Attached as Appendix "A" to the Appellant's Written Submissions.

[12] The Appellant also submitted a chart with additional information regarding the 19 documents.[4] As described in further detail in the analysis below, I do not agree with the descriptions the Appellant provided in its chart. However, I have adopted its approach of numbering the documents 1 through 19, in chronological order, because the Respondent's Schedule "B" list includes three documents no longer at issue and refers to them by tab numbers based on discoveries.

III. Analysis

[13] The Respondent's request for relief can be divided into three categories: (a) incomplete answers and refusals; (b) third-party inquiries and requests; and (c) solicitor-client privilege.

[14] The parties are generally in agreement regarding the relevant provisions of the *Tax Court of Canada Rules (General Procedure)* and case law regarding the scope of examination for discovery, document production, and solicitor-client privilege. As is typical in these motions, the parties disagree on the application of those principles in the circumstances of this particular appeal.

A. Incomplete answers and refusals

[15] The Respondent states that the Appellant improperly refuses to answer relevant factual questions, including questions regarding the purpose of various transactions. The Appellant maintains that the questions at issue were properly refused on the basis of improper follow-up, proportionality, relevance, or privilege.

[16] As stated in Rule 95(1), a person examined for discovery shall answer any proper question relevant to any matter in issue in the proceeding. Relevance on discovery is broadly and liberally construed, with a lower threshold than at trial.[5] It is determined with respect to the facts and issues raised in the pleadings.[6]

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[4] Attached as Appendix "B" to the Appellant's Written Submissions.

[5] *632738 Alberta Ltd. v HMTK*, 2023 TCC 117, para 53.

[6] Both parties relied on *Canadian Imperial Bank of Commerce v HMTQ*, 2015 TCC 280.

[17] In the present case, the Respondent has relied on an extensive list of assumptions of fact regarding the nature and purpose of various transactions,[7] including but not limited to those it refers to as "Avoidance Transactions".[8]

[18] The Appellant's pleading contains a summary description of "The Parties and Transactions",[9] and a general statement that the transactions "were undertaken primarily for purposes other than to obtain a 'tax benefit' and there was no 'avoidance transaction' as required for the operation of the GAAR".[10]

[19] As a result, the nature, purpose, and other details related to the transactions at issue in the appeal are questions of fact that are relevant and well within the proper scope of discovery in this case. There is no to need construe relevancy liberally, and questions related to those transactions do not enter into the realm of a fishing expedition of vague and far-reaching scope.

[20] The Appellant says it has answered the questions and there must be an end to discovery. I appreciate that the Respondent has asked an extensive amount of questions in writing, including some repetitive questions related to both the "purpose" and "reason" for the transactions.[11]

[21] However, the Appellant's own conduct contributed to the protracted examinations for discovery. In some instances, the Appellant provided information in a piecemeal fashion, and the new information finally provided generated additional, relevant questions from the Respondent.

[22] In other instances, the Appellant provided non-responsive or incomplete answers to relevant questions, referred the Respondent to documents that require analysis to determine the Appellant's position or response, and ignored the context of the questions as they relate to specific documents, events, or transactions.

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[7] Amended Reply, para 17.

[8] Amended Reply, para 17(ggg).

[9] Notice of Appeal, paras 4-20.

[10] Notice of Appeal, para 30(b).

[11] The Respondent reduced the number and extent of questions for the purpose of this motion.

[23] The following is one example. After a one-word answer of "Deny" with respect to an assumption of fact regarding the purpose of a particular transaction,[12] the Appellant provided another cursory response to the follow-up question that disregards both the nature of the question and the issues under appeal:

> Q: What does the appellant say was the purpose(s) of the sale of the 14% interest in the Mariner and Flagship development sites from the Trust to the Mariner Towers Partnership? If the appellant's position is that this transaction had multiple purposes, please detail each of those alleged purposes.
>
> A: For the Trust to divest part of its interests in the development.

[24] Under these circumstances, the principles of proportionality are not engaged and cannot be used to foreclose relevant questions in a complex appeal with a large amount of tax in dispute.[13]

1. Questions to be answered

[25] The Appellant is therefore required to answer the following questions:

Question	**Schedule "A" reference**	**Rationale**
2 & 3	Questions 283(17z)(a) & (b): transactions and correct order of steps for the first Plan of Arrangement.	The Appellant's answers were not responsive. The Respondent should not have to guess the Appellant's position by analyzing over 130 pages in three documents.
4	Question 283(17cc)(d): flow of funds for the $13.5 million purchase of shares of Coopers Park Corporation.	The Appellant's answers were not responsive. The Respondent should not have to guess the Appellant's position by attempting to analyze a

[12] Amended Reply, para 17(vv).

[13] *Burlington Resources Finance Company v HMTQ*, 2017 TCC 144, paras 18-23.

		document that "sometimes appears to coincide" with the Reply.[14]
6	Question 283(17vv)(a): purpose of the 2007 divestment of a 14% interest in the development of the Mariner and Flagship development sites.	The Appellant's answer was not responsive as outlined in paragraph 23 above.
7	Question 299(f): the reason for undertaking the transactions in paragraphs 17(h) through (ddd) of the Reply.	As outlined in further detail below.
8	Question 379(e): condominium marketing information.	The Appellant's answer is incomplete. It did not turn its mind to the specific question asked by the Respondent with respect to information marketed to the public, as opposed to statutory disclosure statements.

(a) Question #7

[26] The basis for requiring the Appellant to answer the seventh disputed question, Question 299(f), requires more analysis considering it involves fifteen assumptions of fact in the Amended Reply,[15] and because of the Appellant's particular position in refusing to answer.

[27] Despite the scope of the pleadings, the Appellant determined that it was only required to answer questions related to the specific "Avoidance Transactions" identified in the Amended Reply, rather than all the transactions listed. It did so

[14] Appellant's Written Submissions, para 73.

[15] Paras 17(k), (p), (u), (v), (z)(vi), (aa), (cc), (hh), (ii), (jj), (ll), (mm), (ss), (tt), (uu).

without providing the Court with any authority for such a limitation, likely because no such authority exists.

[28] Instead, the Appellant states that it provided a limited undertaking with respect to its position regarding the purpose of each of the fifteen "Avoidance Transactions" in paragraph 17(ggg) of the Reply. The Appellant argues that the Respondent subsequently—and improperly—expanded the scope of that undertaking to include all of the transactions listed in paragraphs 17(h) through (ddd).

[29] The Respondent argues that this limitation was not the agreement reached between the parties during the January 2021 oral discovery and that it is not appropriate in the circumstances.

[30] Indeed, the parties' communication in this regard is not clear. While the discussion recorded in the discovery transcript referred to undertakings, counsel for the Respondent also discussed reconvening to continue the examination after the information had been exchanged. Ultimately, it seemed the parties agreed that continuing in writing would be the most efficient way to proceed, rather than taking the Appellant's nominee through every transaction.

[31] Notably, the Respondent provided the Appellant with a list of eleven "Additional Discovery Questions" on May 4, 2021.[16] Only two of the questions directly related to undertakings provided during the oral examination for discovery. Notwithstanding the Appellant's current position with respect to Question 299(f), the Appellant answered the other nine questions and document requests, either directly or with reference to answers provided in response to other undertakings.[17] It provided those answers on July 5, 2021,[18] and answered additional follow-up questions up until February 2023.[19]

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[16] Wilson Affidavit #1, Exhibit "C".

[17] Wilson Affidavit #1, Exhibit "D".

[18] Wilson Affidavit #1, para 7.

[19] On December 10, 2021 (Wilson Affidavit #1, para 10); December 22, 2021 (Wilson Affidavit #1, para 12); April 22, 2022 (Wilson Affidavit #2, para 4); February 2, 2023 (Wilson Affidavit #2, para 9).

[32] Under these circumstances, the Appellant's position that examinations for discovery were "complete" or "closed" holds little weight, and its reliance on the 2016 *Superior Plus Corp.* interlocutory decision in this regard is misplaced.[20] Principal examination for discovery had not concluded on January 21, 2021. Both the Appellant and Respondent continued discoveries in writing, through responses to undertakings and follow-up questions.

[33] Furthermore, the Appellant's position that it is only required to answer questions regarding the avoidance transactions listed in the Reply fails to distinguish between the parties' position as stated in the pleadings and the ultimate issues to be determined by the Court in the appeal. The subheadings and definitions in the Reply are not final or conclusive. The trial judge will determine whether a transaction is an "avoidance transaction" under the GAAR, further to the definition in subsection 245(3) of the *Income Tax Act*.[21] Factual questions regarding the nature and purpose of transactions that may not ultimately receive that characterization are relevant and the proper subject-matter of discovery. As argued by the Respondent, all the transactions are relevant because they are part of the series that led to the tax benefit to which the Minister alleges the GAAR applies.

2. Questions that do not have to be answered

[34] The principles and conclusions stated above do not apply to all the questions at issue in this motion. The Appellant is not required to answer the following questions:

Question	**Schedule "A" list reference**	**Rationale**
1	Question 283(17f)(d)	The Respondent seeks information that is subject to solicitor-client privilege, namely the purpose of the retainer between the Concord Pacific

[20] *Superior Plus Corp. v HMTQ*, 2016 TCC 217.

[21] "Series of transactions" also has particular meaning to be determined by the trial judge (*Canada Trustco Mortgage Co. v Canada*, 2005 SCC 54, paras 23-26, and *Deans Knight Income Corp. v Canada*, 2023 SCC 16, paras 54-55).

		Group and the law firm of Moskowitz & Meredith.[22]
5	Question 283(17hh)(b)	The Appellant now admits paragraph 17(hh) of the Reply.[23]
9	Question 379(f)	The Respondent has improperly asked the Appellant to admit the knowledge of third-party purchasers. While the Appellant's answer was not responsive, the question as worded was not properly within the scope of the Appellant's knowledge. It is not a fact that the Appellant can admit.

B. Third-party inquiries and requests

[35] The Respondent asks this Court to require the Appellant to request copies of planning documents and advice from its former advisors, Ernst & Young and Canaccord Capital, on the basis that the Appellant has "power" over those documents within the meaning of the *Tax Court of Canada Rules (General Procedure)*. The Respondent accepts that the Appellant no longer has possession of these documents because the Appellant transferred its documents (and assets) to a third-party company that has since dissolved and is no longer operating. However, the Respondent argues that the Appellant should be ordered to make the requests based on considerations of practicality, proportionality, and fairness. In support of its position, the Respondent relies on the Federal Court decision in *Eli Lilly and Co.*,[24] and this Court's decision in *HSBC Bank Canada*.[25]

[22] Section C of these Reasons contains a more detailed analysis of the issue of solicitor-client privilege in relation to the retainer and the other 18 documents at issue.

[23] Appellant's Written Submissions, para 77. Otherwise, the Appellant would have been required to answer the question because its previous answers were non-responsive.

[24] *Eli Lilly and Co. v Apotex Inc.*, [2000] FCJ No 154 (***Eli Lilly***).

[25] *HSBC Bank Canada v HMTQ*, 2010 TCC 462, para 13 (***HSBC Bank***).

[36] The Appellant argues that that the Respondent's requests were made in the context of improper follow-up questions that are fishing expeditions and disproportionate. The Appellant also argues that the requested documents are outside the Appellant's control.

[37] I agree that the Appellant has provided the Respondent with adequate answers with respect to its knowledge of advice and documents from Canaccord Capital and Ernst & Young. The Appellant has already answered the Respondent's initial questions, first set of follow-up questions, and second set of follow-up questions in this regard.[26]

[38] This Court's ability to compel the Appellant to make further inquiries and requests is limited. Neither the relevant Rules nor the cases relied on by the Respondent apply, primarily because the parties agreed to partial disclosure of documents under Rule 81, rather than full disclosure under Rule 82.

[39] Rule 81 does not require a party to list all relevant documents in a party's possession, control or power.[27] Although Form 81 uses the words "possession, control or power" in relation to the documents to be listed, Rule 81 does not contain this requirement:

81 (1) A party shall, within thirty days following the closing of the pleadings, file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence,	**81 (1)** Dans les trente jours de la clôture des actes de procédure, les parties doivent produire et signifier l'une à l'autre une liste des documents dont chaque partie connaît actuellement l'existence et qui pourraient être présentés comme preuve,
(a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party, or	**a)** soit pour établir ou aider à établir une allégation de fait dans un acte de procédure déposé par la partie;

[26] See the Chart at Appendix "A" to the Appellant's Written Submissions.

[27] *3288063 Canada Inc. v HMTQ*, 2016 FCA 233, para 43.

(b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party.	**b)** soit pour réfuter ou aider à réfuter une allégation de fait dans un acte de procédure déposé par une autre partie.

[40] Only Rule 82 requires a party to "list all the documents that are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal". Rule 78(2) outlines that a document is deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled. The Respondent has effectively relied on the criteria in Rule 78(2), but this deeming provision does not apply to partial disclosure under Rule 81.

[41] This distinction also provides important context for the case law relied on by the Respondent. There is no free-standing, independent test to compel the Appellant to make the requests and inquiries; rather, the cases are based on specific rules of procedure.

[42] The *Eli Lilly* test does not apply because it is based on section 223 of the *Federal Courts Rules*.[28] That provision mirrors this Court's full disclosure under Rule 82 by requiring parties to serve affidavits of documents listing relevant documents in a party's "possession, power or control". In that context, the Federal Court held that the nature of the relationship between a party and third party is determinative of whether "power or control" exists:[29]

> …where one may reasonably expect, because of a relationship existing between a party and some third party, that a request for information will be honoured. It is proper to require that party to make such a request. Here it is my view that the relationship between the purchaser of a bulk drug intended for human consumption and the supplier of that drug is such that a request for the process information which was filed with the Minister of Health would be honoured.

[43] The Respondent's reliance on this Court's application of *Eli Lilly* in *HSBC Bank* is similarly misplaced, not only because of the above distinction, but also

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[28] *Eli Lilly*, para 4.

[29] *Eli Lilly*, para 5.

because this Court applied Rule 83(1).[30] That provision is of no assistance to the Respondent because it applies to documents in the possession, control or power of a taxpayer's affiliated corporate entities, not third-party advisors.

[44] While I appreciate the Respondent's position (and frustration with the Appellant's limited document production), the general, liberal construction permitted under Rule 4 cannot be extended to the degree requested. The Respondent is entitled to pursue other avenues to obtain the information at issue[31] and, where appropriate, to seek costs from the Appellant.

[45] The Appellant is therefore not required to make inquiries and requests in response to the Respondent's additional follow-up questions for Questions 63(a), 63(b), 170 and 236.[32] As stated above, the Appellant has already provided answers to a series of questions in this regard.

C. Solicitor-client privilege

[46] The Appellant asserts solicitor-client privilege with respect to the 19 documents at issue, on the basis that they form part of the chain of communication with counsel to obtain legal advice. The Appellant states that when KPMG LLP (**KPMG Accounting**)[33] authored a document, or forwarded information, it was acting as agent for the Appellant in communication with counsel.

[47] The Respondent disputes the claim of privilege on the basis that an accountant's tax planning advice is not privileged and the Appellant has not provided

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[30] *HSBC Bank*, para 8. The Respondent also attempted to rely on *Miller v Canada*, 2022 FCA 183, a decision that can be distinguished because it deals with the proper scope of requirements to provide information and documents under section 231.1 of the *Income Tax Act*.

[31] The Respondent argued that it would be required to proceed by way of Rule 99 to discover a third party, but Rule 86 also allows for an application seeking production of a document in the possession of a third party.

[32] The correction identified by the parties to refer to Question 63 instead of Question 61 listed in Schedule "A" of the Respondent's Notice of Motion.

[33] To distinguish between the legal and accounting arms of KPMG LLP.

sufficient evidence to establish that KPMG Accounting was acting as an agent in these specific instances.

[48] The parties are in agreement on the test for solicitor-client privilege in general and with respect to communications involving third parties, such as accountants. Although those principles are not in dispute, they bear repeating as follows.

[49] Solicitor-client privilege applies to a communication between solicitor and client that entails the seeking or giving of legal advice, and that is intended by the parties to be confidential.[34] The privilege applies to documents within the continuum of communication in which the solicitor tenders advice.[35]

[50] There is no accountant-client privilege.[36] Documents containing accounting, business, or policy advice are not privileged.[37] However, solicitor-client privilege applies where an accountant acts as a representative or agent for a client in obtaining legal advice from a solicitor.[38]

[51] There is no privilege where the accountant gives original and independent tax advice to either the lawyer or the client, even if the lawyer has overall responsibility in providing advice for a transaction.[39]

[52] In *Redhead Equipment Ltd.*, the Saskatchewan Court of Appeal summarized the applicable principles:[40]

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[34] *Solosky v Canada*, [1980] 1 SCR 821 at p 837.

[35] *Redhead Equipment Ltd. v Canada (Attorney General)*, [2016] SJ No 471 (SKCA), paras 34-36 (***Redhead Equipment Ltd.***).

[36] *Redhead Equipment Ltd.*, para 44. See also *Belgravia Investments Limited v Canada*, 2002 FCT 649 (FC), paras 43-46 and 49-50 (***Belgravia***).

[37] *Redhead Equipment Ltd.*, para 33.

[38] *Redhead Equipment Ltd.*, paras 38-41 and 44.

[39] *Redhead Equipment Ltd.*, para 48.

[40] *Redhead Equipment Ltd.*, para 45.

a. whether a communication is privileged depends on the function served by the third party in relation to the communication;

b. the privilege extends only to communications in furtherance of a function essential to the solicitor-client relationship or the continuum of legal advice provided by the solicitor, for example:

   i. a channel of communication between solicitor and client;

   ii. a messenger, translator or transcriber of communications to or from the third party by the solicitor or client;

   iii. employing expertise to assemble information provided by the client and explaining the information to the solicitor; and

c. no privilege attaches to a communication to an accountant who must consider it and provide his or her own accounting opinion.

[53] The Saskatchewan Court of Appeal applied a functional approach, where privilege is determined based on an analysis of the function of the third party vis-à-vis the client and the solicitor in respect of the communication.[41]

[54] This Court applied similar principles in a decision that pre-dates *Redhead Equipment Ltd*. In *Imperial Tobacco*, the Court reviewed similar case law and held that the application of solicitor-client privilege to a third-party communication depends on the true nature of the function that the third party was retained to perform.[42]

[55] This Court also held that where a party fails to lead evidence in support of its claim for privilege, the Court must make a decision solely on the face of the document:[43]

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[41] *Redhead Equipment Ltd.*, para 43.

[42] *Imperial Tobacco Canada Limited v HMTQ*, 2013 TCC 144, para 73 (***Imperial Tobacco***). See also paras 70-71.

[43] *Imperial Tobacco*, para 52. Footnote omitted.

> The Appellant elected not to provide either affidavit evidence or *viva voce* evidence to support its claim for privilege. The burden rests on the person claiming solicitor-client privilege to show, on a balance of probabilities, that the document in question is privileged. I have not drawn any negative inferences from the Appellant's decision not to provide either affidavit or *viva voce* evidence. However, in situations where the party claiming privilege does not produce such evidence, but provides the Court with copies of the relevant documents for inspection, the Court must make a decision based solely upon the documents. If, on the face of the document, no privilege appears to exist, then the document is not privileged.

[56] This paragraph is of note because the Appellant has chosen not to provide supporting evidence in the present motion. Instead, the Appellant relies on a chart listing the documents in question, with a column entitled "Nature of the communication or document and subject line".[44]

[57] However, this chart is not evidence. Moreover, in some instances, the Appellant's descriptions and characterizations are not consistent with the documents themselves.

[58] The Appellant also attempts to rely on letters from counsel contained in the parties' respective motion records to support its claim of solicitor-client privilege. However, those documents do not have the weight of affidavit evidence. More importantly, as outlined in further detail below, they provide incomplete or inconsistent information that is of limited assistance.

[59] The Appellant's failure to provide affidavit evidence also is fatal where the document in question does not include a date or the names of the author or recipient.

[60] Absent affidavit evidence from the parties directly involved, I cannot conclude, on the balance of probabilities, that the documents in question were part of the continuum of obtaining legal advice. Mere assertions are not sufficient.[45]

[61] That being said, my analysis begins with the document I agree contains information subject to solicitor-client privilege because it outlines the legal advice to be provided to the Concord Pacific Group, with the assistance of KPMG

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[44] Appellant's Written Submissions, paras 133-136 and Appendix "B".

[45] *Belgravia*, para 48. See also *Raimax Properties Ltd v Pt. Ellice Properties Ltd.*, 2021 BCSC 2454, paras 12, 14-17 for the type of affidavit evidence that should be provided.

Accounting. This "Engagement Letter" is the basis for the Appellant's claim of privilege over the other 18 documents.

[62] Further to the *Redhead Equipment Ltd*. test, I must assess KPMG Accounting's role functionally, in terms of what it was retained to do, its relationship with the Appellant and related parties, and what it actually did in a particular instance.

[63] As outlined below, I have concluded that, with respect to certain documents at issue, KPMG Accounting acted beyond the function of agent and provided independent legal advice to the Appellant and another solicitor, Farris Law. Other documents do not contain sufficient information to establish a claim of solicitor-client privilege.

1. The Engagement Letter contains privileged information to be redacted

- **Document 1**: September 3, 2004 letter from Moskowitz & Meredith LLP to Concord Pacific Group Inc., Farris Vaughan Wills & Murphy, and KPMG Accounting.

[64] The Engagement Letter establishes the solicitor-client relationship between the "Concord Parties" (Grand Adex Development Ltd., Concord Pacific Group Inc. and affiliates) and Moskowitz & Meredith LLP (**Moskowitz Law**), as well the parties that would be involved as agents to assist in the provision of legal advice. Although the Appellant and the Concord Parties were separate entities at the time, the Respondent accepts that the Appellant subsequently became part of the group through the transactions at issue in the appeal. Neither the Respondent nor the Appellant fully explained how this transition formally occurred, likely because the true implications of the transactions will be decided at trial.[46] Out of an abundance of caution, I have accepted that the Appellant is entitled to claim solicitor-client privilege is this regard.

[65] The Engagement Letter contains information covered by solicitor-client privilege, namely that Moskowitz Law was to provide legal advice with respect to tax matters described in four bullet points. The Engagement Letter can be produced

[46] The Respondent summarized the general way in which this occurred in paras 1 through 5 of the Amended Reply.

to the Respondent to redact that privileged information contained in the final paragraph of page 1 up to and including the four bullet points that continue on to page 2.

[66] Otherwise, the remainder of the Engagement Letter is not privileged because it outlines the relationship between the various entities. The Concord Parties, with KPMG Accounting and Farris Vaughan Wills & Murphy (**Farris Law**) acting on their behalf, engaged Moskowitz Law to provide legal advice.

[67] Moskowitz Law's role was to provide legal advice to the Concord Parties in connection with certain tax matters, based on facts provided by the Concord Parties, Farris Law, and KPMG Accounting.

[68] KPMG Accounting's role was to act as agent on behalf of the Concord Parties to retain Moskowitz Law and to provide Moskowitz Law with factual and other information.

[69] The particular role of Farris Law is less clear because the Appellant has not provided affidavit evidence in this regard.

[70] Although Farris Law is described as an agent for the Concord Parties, the Engagement Letter indicates that Farris Law also would be providing legal advice to the Concord Parties. For example, the Engagement Letter outlines that in the course of providing legal advice, Moskowitz Law and Farris Law would (a) discuss the matter with KPMG Accounting; (b) obtain information from KPMG Accounting; and (c) provide information and advice to KPMG Accounting. The Engagement Letter also contains a general statement that legal advice delivered outside the scope described would require a separate engagement letter.

[71] The Appellant's silence on this issue in this motion is problematic because none of the remaining 18 documents at issue involve communications with Moskowitz Law. Instead, some are direct communications between KPMG Accounting and Farris Law.

[72] As a result, there is insufficient evidence to establish that solicitor-client privilege applies on the basis that KPMG Accounting was acting as agent for the Concord Parties with Moskowitz Law, when Farris Law was the recipient of or involved in the communications at issue.

2. Documents where solicitor-client privilege not established

[73] A number of documents must be disclosed because the Appellant has failed to provide sufficient evidence that they are subject to solicitor-client privilege, either as a direct communication or a third-party communication in the continuum of communication to obtain legal advice from Moskowitz Law.

[74] I have based this determination on two main grounds. First, in some instances the document on its face contains insufficient information, because neither the author nor the recipient is listed and there is no clear connection to the provision of legal advice.[47]

[75] Second, in other instances KPMG Accounting provided independent legal advice beyond the scope of its role as agent under the Engagement Letter. As argued by the Respondent, providing advice to a lawyer as part of an overall retainer, even if the lawyer then incorporates it into their own legal advice, does not make a communication privileged. Furthermore, KPMG Accounting provided that legal advice to Farris Law, a different law firm outside of the specific solicitor-client relationship established in the Engagement Letter.

(a) insufficient information

- **Document 2**: September 3, 2004 letter from KPMG Accounting to Concord Pacific Group Inc. re confidentiality procedures.

[76] This document does not contain legal advice, the passing of legal advice, or an indication that it is part of the communication to obtain legal advice within the scope of the Engagement Letter.

[77] KPMG Accounting does not refer to the Engagement Letter or specify that it is acting as agent with respect to legal advice to be provided by Moskowitz Law. Instead, the letter outlines that KPMG Accounting also was providing Concord Pacific Group Inc. with strategic tax advisory services and that confidentiality measures were put in place because KPMG Accounting was providing similar services to the Appellant (Infowave). Other than the shared date, there is no link to

[47] The Court reached similar conclusions in *Imperial Tobacco*, para 59.

the Engagement Letter. Moreover, the letter is almost identical to another document already produced by the Appellant without a claim of privilege, namely a letter dated September 3, 2004 from KPMG Accounting to the Appellant (Infowave).[48]

- **Document 3**: September 7, 2004 letter from KPMG Accounting to Adex Industries Inc. re confidentiality procedures.

[78] This document does not contain legal advice, the passing of legal advice, or an indication that it is part of the communication to obtain legal advice within the scope of the Engagement Letter. The same rationale as outlined for the almost identical letter in Document 2 above applies. Notably, this particular document is described as a "Confidentiality Procedures letter" in the September 16, 2004 email in Document 5 discussed below.

- **Document 4:** September 14, 2004 Draft Infowave Inversion Strategy diagrams with handwritten notes.

[79] This document does not contain legal advice, the passing of legal advice, or an indication that it is part of the communication to obtain legal advice within the scope of the Engagement Letter. The Appellant did not provide affidavit evidence to indicate who authored the document, who made the notes, or the reason for the document. The Appellant's submission that it was drafted by KPMG Accounting to provide services under the Engagement Letter is not apparent on the face of the document. Moreover, the Appellant has already produced similar undated handwritten notes and diagrams without a claim of privilege.[49]

- **Document 5**: Emails dated September 14, 15 and 16, 2004 between George Reznik, Infowave, Cliff McCracken, Concord Group, and Tony Tse, KPMG Accounting.

[80] The emails do not contain legal advice, the passing of legal advice, or an indication that they are part of the communication to obtain legal advice within the

[48] Wilson Affidavit #1, Exhibit "M", document produced by the Appellant as part of its December 22, 2021 further response to follow-up questions. Also produced with a cover letter as part of the Appellant's April 22, 2022 response to Q179, Wilson Affidavit #2, Exhibit "A", pp 17-20.

[49] Wilson Affidavit #1, Exhibit "O".

scope of the Engagement Letter. Rather, the emails refer to confidentiality procedures in place between KPMG Accounting and Adex Industries Inc. further to the September 7, 2004 letter (Document 3 discussed above).

- **Document 6**: Email correspondence dated October 26, 2004 between Farris Law, KPMG Accounting and Infowave.

[81] This document consists of two emails, neither of which contain legal advice, the passing of legal advice, or an indication that they are part of the communication to obtain legal advice within the scope of the Engagement Letter.

[82] Mitchell Gropper, Farris Law, asked KPMG Accounting a question regarding the shareholdings/ownership of Infowave (the Appellant). In the second email, Infowave provided Concord (and others) with a share capital analysis. Concord forwarded the email to KPMG Accounting. There is no email providing the information to Farris Law or Moskowitz Law. In any event, it is factual information that can be disclosed.

- **Document 9**: November 3, 2004 emails from (1) Tony Tse, KPMG Accounting, to Mitchell Gropper, Farris Law and (2) Mitchell Gropper, Farris Law, to George Reznik, Infowave, and Ron Voyer, Ernst & Young.

[83] The Appellant has produced a redacted copy of this email chain, disclosing the portion over which it no longer claims privilege. It maintains a claim of privilege over two email communications at the beginning of the chain between KPMG Accounting and Farris Law, while disclosing the factual information in the subsequent emails. However, the redacted emails do not contain legal advice, the passing of legal advice, or an indication that it is part of the communication to obtain legal advice under the Engagement Letter. KPMG Accounting and Farris Law asked factual questions and received factual answers in return.

- **Document 10**: December 2, 2004 letter from KPMG Accounting to Adex Industries, signed by Adex Industries and Concord Pacific Group Inc. on December 3, 2004.

[84] This document does not contain legal advice, the passing of legal advice, or an indication that it is part of the communication to obtain legal advice within the

scope of the Engagement Letter. KPMG Accounting wrote to update confidentiality procedures further to the "Conflict Letters" dated September 7, 2004 (Document 3) and November 2, 2004.[50]

(b) independent legal advice from KPMG Accounting not privileged

[85] The following documents are not privileged because they fall outside the scope of the Engagement Letter. KPMG Accounting provided independent legal advice to Farris Law. It did not provide factual or other information to Moskowitz Law as agent for the Appellant. The documents have the hallmarks of a legal opinion and there is no indication that KPMG Accounting was reproducing legal advice provided by Moskowitz Law.

- **Document 7:** November 1, 2004 Memorandum from Tony Tse, KPMG Accounting, to "The tax file of Farris Vaughan Wills & Murphy", copied to John Zaytsoff, KPMG Accounting, and Mitchell Gropper, Farris Law.

- **Document 8:** November 1, 2004 Memorandum from Tony Tse, KPMG Accounting, to "The tax file of Farris Vaughan Wills & Murphy", copied to John Zaytsoff, KPMG Accounting, and Mitchell Gropper, Farris Law.

- **Document 11**: December 3, 2004 Draft memorandum from KPMG Accounting to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave", copied to John Zaytsoff, KPMG Accounting, and Mitchell Gropper, Farris Law.

- **Document 12**: December 3, 2004 Draft memorandum from KPMG Accounting to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave", copied to John Zaytsoff, KPMG Accounting and Mark Chu.

- **Document 13**: December 19, 2004 Letter from KPMG Accounting to Mitchell Gropper, Farris Law.

[50] Produced by the Appellant in its April 22, 2022 response to Q179, Wilson Affidavit #2, Exhibit "A", pp 29-30.

- **Document 14**: December 19, 2004 Letter from KPMG Accounting to Mitchell Gropper, Farris Law.

- **Document 15**: January 5, 2005 Research memo from KPMG Accounting to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave".

- **Document 16**: March 15, 2005 Letter from John Zaytsoff, KPMG Accounting to Mitchell Gropper, Farris Law.

- **Document 17**: September 7, 2005 Draft letter from John Zaytsoff, KPMG Accounting, to Mitchell Gropper, Farris Law, re: Coopers Park Partnership Structure.

- **Document 18**: March 15, 2005 Draft letter from Tony Tse, KPMG Accounting, to "The tax file of Farris Vaughan Wills & Murphy – Project Airwave". Copied to Johns Zaytsoff, KPMG Accounting, and Mitchell Gropper, Farris Law.

[86] As stated earlier in these Reasons, the Appellant's reliance on letters in the respective motion records to support its claim of privilege over these documents is misplaced. In a letter to the Canada Revenue Agency dated September 20, 2012,[51] Moskowitz Law claimed privilege over Documents 13, 14, 15, 17 and 18, on the basis that KPMG Accounting was conveying Moskowitz Law's legal advice. This claim is not supported by the contents of the documents, which make no mention of Moskowitz Law. Affidavit evidence was required to support this assertion.

[87] Farris Law made a slightly different claim with respect to Documents 13, 14, and 16. In a letter dated August 31, 2012, Farris Law stated that One West Holdings Ltd., formerly Concord Pacific Group Inc., claims solicitor-client privilege over these letters on the basis that they are addressed to Farris Law and communicate legal advice from Moskowitz Law and KPMG Accounting.[52] This assertion also is not supported on the face of the document and affidavit evidence providing a consistent explanation was required.

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[51] Wilson Affidavit #1, Exhibit "Q".

[52] Wilson Affidavit #1, Exhibit "P".

3. Document protected by solicitor-client privilege

- **Document 19**: Email chain from October 11, 2007 to October 23, 2007, between Mona Chan, Concord Pacific Group, Tony Tse, KPMG Accounting, and Keith Burrell, McCarthy Tétrault, and copied to others including John Zaytsoff and Cliff McCracken.

[88] Although this communication falls outside the scope of the Engagement Letter and there is no evidence regarding who retained McCarthy Tétrault, this document does not have to be produced. Out of an abundance of caution, I agree with the Appellant that it is subject to solicitor-client privilege because it is correspondence exchanging comments in the course of McCarthy Tétrault's preparation of a legal agreement.

IV. Conclusion

[89] Considering the extent of information to be provided under this decision, the Respondent should have the opportunity to ask proper follow-up questions with respect to new information contained in the answers and documents to be provided by the Appellant.

[90] The Appellant will have 60 days from the date of this Order to provide the answers and documents described above. If necessary, the parties will have an additional 35 days to file an agreed timetable for final follow-up questions and answers arising from the answers and documents provided.

Signed at Ottawa, Canada, this 20th day of September 2024.

"Joanna Hill"

Hill J.

CITATION:	2024 TCC 122
COURT FILE NO.:	2014-4504(IT)G
STYLE OF CAUSE:	Coopers Park Real Estate Development Corporation v. His Majesty The King
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 12, 2023
REASONS FOR ORDER BY:	The Honourable Justice Joanna Hill
DATE OF ORDER:	September 20, 2024

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