

Dockets: 2021-2270(IT)G  
2021-2269(IT)G

BETWEEN:

MARGARET STACK and LOUIS STACK,

Appellants,

and

HIS MAJESTY THE KING,

Respondent.

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Respondent's Motion heard on May 13, 2024 at Toronto, Ontario

Before: The Honourable Justice Randall S. Boccock

Appearances:

Counsel for the Appellant: Kristen Duerhammer  
Justin Kutyan  
Marta Porodko

Counsel for the Respondent: Alexandra Humphrey  
Amin Nur  
Caroline Ahn

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**ORDER RE PRIVILEGE**

WHEREAS the Respondent brings a motion to compel better or more complete answers from the Appellants to multiple questions posed on examination for discovery (the "Respondent's motion");

AND WHEREAS the Respondent's motion, *inter alia*, requested the production of five documents in which the Appellants have claimed solicitor-client privilege;

AND WHEREAS the Court has published its specific Reasons for Order re: Privilege concerning the issue of the claimed privilege in the redacted documents, with written reasons and orders to follow concerning other refusals not concerning claimed privilege in certain documents;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The documents described in paragraph 2 below contain privileged information, rightfully redacted, described and retained by Appellants' counsel;
2. The Respondent's Motion for unredacted copies of the five documents listed below is denied:
  - a) Email from Doug Rae (Midnight Financial) to Bob Hahn (H&H LLP) re: Fitter International Inc. / 1714862 Alberta Ltd – Production Number A00157;
  - b) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychyj (Felesky Flynn LLP) to Bob Hahn (H&H LLP) re: sale to Tecate Northern Trust dated July 31, 2017 – Production Number A00313;
  - c) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychyj (Felesky Flynn LLP) to Bob Hahn (H&H LLP) re: sale to Tecate Northern Trust dated July 31, 2017 – Production Number A00317;
  - d) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychyj (Felesky Flynn LLP) to Bob Hahn (H&H LLP) re: Repurchase of Shares of 1714862 and Fitter and Repayment of Promissory Note dated September 11, 2017 – Production Number A00320; and,
  - e) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychyj (Felesky Flynn LLP) to Margaret and Louis Stack and Hahn (H&H LLP) re: Repurchase of Shares of 1714862 and Fitter and Repayment of Promissory Note dated September 11, 2017 – Production Number A00323.

3. Costs in this portion of the motion are reserved.

Signed at Toronto, Ontario this 24<sup>th</sup> day of October 2024.

“R. S. Bocock”

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Bocock J.

Citation: 2024 TCC 137  
Date: 20241024  
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2021-2269(IT)G

BETWEEN:

MARGARET STACK and LOUIS STACK,

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and

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**REASONS FOR ORDER RE: PRIVILEGE**

Bocock J.

[1] These reasons pertain to a small portion only of the documents and other answers sought by the Respondent in these appeals. The Respondent brought a motion on May 13, 2024 seeking production of various documents and information withheld on examinations for discovery by the Appellants. Only 5 of those many documents were retained because of solicitor-client privilege.

[2] The description of the claimed privileged documents are described as follows (the “subject documents”):

- a) Email from Doug Rae (Midnight Financial) to Bob Hahn (H&H LLP) re: Fitter International Inc. / 1714862 Alberta Ltd – Production Number A00157;
- b) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychj (Felesky Flynn LLP) to Bob Hahn (H&H LLP) re: sale to Tecate Northern Trust dated July 31, 2017 – Production Number A00313;
- c) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychj (Felesky Flynn LLP) to Bob Hahn (H&H LLP) re: sale to Tecate Northern Trust dated July 31, 2017 – Production Number A00317;

- d) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychj (Felesky Flynn LLP) to Bob Hahn (H&H LLP) re: Repurchase of Shares of 1714862 and Fitter and Repayment of Promissory Note dated September 11, 2017 – Production Number A00320;
- e) Reporting Memorandum from Tim Kirby (Felesky Flynn LLP) and Sean Zubrychj (Felesky Flynn LLP) to Margaret and Louis Stack and Hahn (H&H LLP) re: Repurchase of Shares of 1714862 and Fitter and Repayment of Promissory Note dated September 11, 2017 – Production Number A00323.

[3] Essentially, these 5 documents constitute 3 documents because the two reporting memoranda are identical; they were produced repeatedly because each was sent twice by distinct covering email.

[4] The Appellants sum up their opposition to disclosing anything but the redacted versions on the following basis:

- i. The Minister assumed that Margaret and Louis Stack, the Appellants, retained Felesky Flynn LLP as legal counsel in connection with the transactions at issue;
- ii. The documents over which the Stacks have claimed solicitor-client privilege are, on their face, for the purpose of providing legal advice. The memoranda contain a Felesky Flynn LLP header and a “privileged and confidential” stamp, they were drafted by Felesky Flynn LLP lawyers, they were sent to the clients of Felesky Flynn LLP in the course of a professional retainer, and are reporting memoranda relating to their services for the transactions;
- iii. Where documents pass between parties in professional confidence, i.e., “for the purpose of obtaining legal advice and assistance” such documents are privileged. The circumstances support reasonable evidence to establish both a solicitor-client relationship and solicitor-client privilege. Therefore, the appellants’ claim of solicitor-client privilege is valid.

[5] At the hearing of the Motion, Appellants’ counsel provided an unredacted copy of the documents to the Court. The parties agreed this would facilitate the Court’s review of the subject documents and determination of the claimed privilege.

[6] This process for review is generally observed as compliant with section 88(d) of the *Tax Court of Canada Rules (General Procedure)* (the “Rules”). Further, it has been used as a procedure in previous motions before the Tax Court: *Imperial Tobacco v HMQ* 2013 TCC 144 at para. 52 [“*Imperial Tobacco*”]; see also *CIBC v HMQ* 2015 TCC 280 at paras. 244 – 245.

[7] Solicitor-client privilege limits the scope of discovery when potential information gathering during the discovery process conflicts with privilege: *M.(A.) v. Ryan*, [1997] 1 SCR 157. The law of privilege protects information from disclosure in court. It also protects communications between a lawyer and client, including an agent of the client: *Solosky v. The Queen*, [1980] 1 SCR 821 at para 837 [“*Solosky*”].

[8] The general principles of solicitor-client privilege were summarized in *Imperial Tobacco* where Justice D’Arcy cited a paragraph in *Blank v. Canada* [2006] 2 SCR 319 at para 16, summarizing the doctrine of solicitor-client privilege:

...The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

[9] The basic test for determining whether solicitor-client privilege applies was laid out by the Supreme Court of Canada in *Solosky*, supra. The party asserting privilege must demonstrate that the communication: (a) has been made for the purpose of giving or receiving professional advice; (b) was made in confidence with no third party present and with the intent it be kept confidential; and (c) was made within the scope of ordinary professional employment.

[10] Solicitor-client privilege “protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating or giving of legal advice; it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of

communication in which the solicitor tenders advice”: *Samson Indian Nation and Band v. Canada*, 1995 CarswellNat 675 (FCA) at para 8.

[11] Nonetheless, the party asserting privilege bear the burden of proving that the documents constitute a privileged communication:

[47] 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. ...

[48] The party claiming the privilege must do more than baldly assert the privilege. ...: *Belgravia Investments Limited v. Canada*, 2002 FCT 649 at paras 47-48.

[12] As long as the circumstances indicate the parties intend to keep the communication secret, the communication will be privileged. The privilege encompasses all communication in the solicitor-client relationship, but is for communications only. Disclosure of facts independent of a communication may be ordered.

[13] Communications must be made in the course of seeking legal advice and made in order to elicit professional advice from the lawyer based on the lawyer’s expertise in the law. Legal advice means advice about potential actions to be taken: *Quadrini v. MNR*, 2011 FCA 115 at para 35. Business advice from the lawyer does not qualify. However, if a client seeks legal advice for the purpose of perpetrating a crime or fraud, there is no privilege. The solicitor’s knowledge of the client’s intention is irrelevant.

[14] After conducting a review of Production Numbers A00313, A00317, A00320 and A00323, being Exhibits W, X, Y and Z, the Court concludes that such reporting memoranda from Felesky Flynn LLP to either the Appellants or the Appellants’ agents constitute legal advice clothed entirely by solicitor-client privilege. Hence, they are protected and need not be produced, save in the redacted format they have been.

[15] The final redacted document, actually the first identified, Production # A00157 (being Exhibit V) is the Doug Rae email described above. While the accurate description or title of the document does not, unlike the above memoranda perhaps, explicitly disclose the integrated legal advice proffered by counsel to clients

concerning a factual scenario, the document elementally contains protected confidential legal advice which is the subject of properly claimed solicitor/client privilege. This was easily identified by the Court after review, despite its delivery to an intermediately retained professional. The use of an accountant as a representative in the course of obtaining legal advice or legal assistance for a client does not nullify otherwise privileged communications: *Imperial Tobacco* at para 71, citing *Susan Hoisery Ltd. v. MNR* (1969), 69 DTC 5278 (Ex. Ct.). Such is the case with this document.

[16] To clarify, these reasons pertain solely to documents identified and in which the Appellants have claimed solicitor-client privilege. They do not relate to other non-documentary refusals made by the Appellants for reasons of privilege. Those refusals include hybrid bases for refusal such as relevance and/or proportionality. Those hybrid refusals shall be dealt with by the Court in its shortly forthcoming reasons related to the balance of the cross-motions to compel by both parties concerning the many questions on examination for discovery where each party responded with reciprocating refusals.

[17] Costs shall be reserved at present.

Signed at Toronto, Ontario, this 24<sup>th</sup> day of October 2024.

“R.S. Boccock”

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Boccock J.



CITATION: 2024 TCC 137

COURT FILE NO.: 2021-2270(IT)G  
2021-2269(IT)G

STYLE OF CAUSE: MARGARET STACK and LOUIS  
STACK AND HIS MAJESTY THE KING

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 13 and 15, 2024

REASONS FOR ORDER BY: The Honourable Justice Randall S. Boccock

DATE OF ORDER: October 24, 2024

APPEARANCES:

Counsel for the Appellant: Kristen Duerhammer  
Justin Kutyan  
Marta Porodko

Counsel for the Respondent: Alexandra Humphrey  
Amin Nur  
Caroline Ahn

COUNSEL OF RECORD:

For the Appellant:

Name: Justin Kutyan

Firm: KPMG Law LLP  
Toronto, Ontario

For the Respondent:

Shalene Curtis-Micallef  
Deputy Attorney General of Canada  
Ottawa, Canada