

Federal Court



Cour fédérale

Date: 20110224

Docket: T-88-09

Citation: 2011 FC 224

Ottawa, Ontario, February 24, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**TAXPRO PROFESSIONAL CORPORATION
AND HARI NESATHURAI**

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, a lawyer and his professional corporation, seeks, among other remedies, an Order setting aside the Respondent's requirement to provide information and documents relating to the Applicant's client, a Canadian corporate taxpayer, 1082955 Ontario Limited.

[2] An officer of the Canada Revenue Agency issued the requirement pursuant to paragraphs 231.2(1)(a) and (b) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 as amended (*ITA*) by a letter dated December 22, 2008. The Applicant is required by the legislation to comply.

[3] The Applicant claims the information and documents sought by the Respondent are covered by solicitor-client privilege and brings this application.

[4] The Respondent asks the Court to either dismiss the application or require the Applicant to prepare a list of documents over which solicitor-client privilege is claimed to be reviewed and decided upon by the Court.

[5] I have decided that the documents are reviewable by the Court in order to determine whether solicitor-client privilege applies.

Background

[6] Mr. Nesathurai is a lawyer licensed to practice law in Ontario. The bulk of his practice is tax law. 1082955 Ontario Limited (108 Ltd.) is his client.

[7] Mr. Roy Crooker is an officer of the Canada Revenue Agency (CRA). He began an audit of 108 Ltd.'s 2005 taxation year and later expanded his audit to include the 2003 and 2004 taxation years.

[8] The impetus for the CRA requirement for information and documents relate to payments made by 108 Ltd. to Specialty Insurance Limited (SIL), an entity organized in St. Lucia, West

Indies, in the years 2003, 2004 and 2005. The payments were made for the purpose of acquiring three separate Group Sickness and Accident Insurance Policies from SIL. The CRA alleges the same amounts, less an accommodation fee, were loaned back to 108 Ltd. by Continental Trust Corporation (CTC), a Bermudian corporate entity related to SIL.

[9] The December 22, 2008 s. 231.2(1) requirement under the *ITA* was sent to the Applicant for information and documents with a listing of items sought. A similar request was delivered to the Applicant's client, 108 Ltd., which responded on February 11, 2009 by providing the CRA with the documents and information not covered by the solicitor-client privilege claimed. 108 Ltd. did not waive solicitor-client privilege with respect to the documents the Applicant claimed to be covered by privilege.

[10] The remaining items at issue from the December 22, 2008 requirement are items A, G and H. from the original list. They read:

- A. Any and all planning documents or information with respect to 1082955 Ontario Limited (1082955) and the purchase of the insurance premiums from Specialty Insurance Limited (SIL) and the loans from Continental Trust Corporation Limited (CTC).
- G. Any and all memorandum, correspondence, letters, emails, notes, records of discussions or any other kind of document, whether in paper format, electronic format or any other type of format between any of 1082955, Hari S. Nesathurai, SIL or CTC or any other third party with respect to SIL, GSAIP or CTC;
- H. Any and all documents or information of any type whatsoever attached to any correspondence between Hari Nesathurai and 1082955; ...

[11] The Applicant has placed before the Court a sealed envelope labelled: “Confidential Documents – Solicitor-Client Privileged Materials: Not to Be Opened Until Hearing of this Application”.

Legislation

[12] The *Income Tax Act*, (1985, c. 1 (5th Supp.)) provides:

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,
 (a) any information or additional information, including a return of income or a supplementary return; or
 (b) any document.

...

232. (1) In this section,
 “judge” means a judge of a superior court having jurisdiction in the province

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l’application ou l’exécution de la présente loi (y compris la perception d’un montant payable par une personne en vertu de la présente loi), d’un accord général d’échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s’applique ou d’un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d’une personne, dans le délai raisonnable que précise l’avis :
 a) qu’elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
 b) qu’elle produise des documents.

...

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

where the matter arises or a judge of the Federal Court;

“lawyer” means, in the province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor;

“officer” means a person acting under the authority conferred by or under sections 231.1 to 231.5;

“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 deemed not to be such a communication.

...

(5) An application under paragraph 232(4)(c) shall be heard in camera, and on the application
(a) the judge may, if the judge considers it necessary to determine the question, inspect the document and, if the judge does so, the judge shall ensure that it is repackaged and

« avocat » Dans la province de Québec, un avocat ou notaire et, dans toute autre province, un barrister ou un solicitor.

« fonctionnaire » Personne qui exerce les pouvoirs conférés par les articles 231.1 à 231.5

« juge » Juge d’une cour supérieure compétente de la province où l’affaire prend naissance ou juge de la Cour fédérale.

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

...

(5) Une requête présentée en vertu de l’alinéa (4)c) doit être entendue à huis clos. Le juge qui en est saisi :
a) peut, s’il l’estime nécessaire pour statuer sur la question, examiner le document et, dans ce cas, s’assure ensuite qu’un colis du document soit refait et que ce colis soit rescellé;

resealed; and
 (b) the judge shall decide the matter summarily and,
 (i) if the judge is of the opinion that the client has a solicitor-client privilege in respect of the document, shall order the release of the document to the lawyer, and
 (ii) if the judge is of the opinion that the client does not have a solicitor-client privilege in respect of the document, shall order
 (A) that the custodian deliver the document to the officer or some other person designated by the Commissioner of Revenue, in the case of a document that was seized and placed in custody under subsection 232(3), or
 (B) that the lawyer make the document available for inspection or examination by the officer or other person designated by the Commissioner of Revenue, in the case of a document that was retained under subsection 232(3.1),
 and the judge shall, at the same time, deliver concise reasons in which the judge shall identify the document without divulging the details thereof.
 (emphasis added)

b) statue sur la question de façon sommaire :
 (i) s'il est d'avis que le client bénéficie du privilège des communications entre client et avocat en ce qui concerne le document, il ordonne la restitution du document à l'avocat ou libère l'avocat de son obligation de le retenir, selon le cas,
 (ii) s'il est de l'avis contraire, il ordonne :
 (A) au gardien de remettre le document au fonctionnaire ou à quelque autre personne désignée par le commissaire du revenu, en cas de saisie et mise sous garde du document en vertu du paragraphe (3),
 (B) à l'avocat de permettre au fonctionnaire ou à l'autre personne désignée par le commissaire du revenu d'inspecter ou examiner le document, en cas de rétention de celui-ci en vertu du paragraphe (3.1).
 Le juge motive brièvement sa décision en indiquant de quel document il s'agit sans en révéler les détails.

Issue

[13] The Applicant identifies a single issue: Does solicitor-client privilege protect the documents from production?

[14] The Respondent frames the issue as whether the Minister properly issued a requirement for information documents to the Applicant.

Analysis

[15] Pursuant to paragraphs 231.2(1)(a) and (b), the Minister may require that any person provide any information or any document for any purpose related to the administration or enforcement of the *ITA*. This requirement is broad, limited only to any purpose related to the administration or enforcement of this Act.

[16] The Applicant contends the Respondent's requirement is overly broad, as demonstrated by the words "Any and all ..." and amounts to a fishing expedition. But, even if it was not, the Applicant contends the information and documents are protected from production because of solicitor-client privilege.

[17] The Applicant submits the applicable principle is that articulated in *Descoteaux v Mierzwinski*, [1982] 1 SCR 860 (*Descoteaux*) by the Supreme Court of Canada:

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. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

[18] The Applicant cites from Vern Krishna, *The Fundamentals of Income Tax Law*, 7th ed. (Carswell: 2009) for the proposition that the tax plans are included as documents over which privilege should be recognized. That text reads:

For tax purposes, “privilege” means the right that a person has to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between client and lawyer in a professional confidence.

In general terms, the following types of documents are covered by solicitor-client privilege:

- Correspondence between solicitor and client
- Opinion letters
- Tax plans, reorganizations, agreements of purchase and sale and other agreements.

[19] The Applicant submits that he has tendered affidavit evidence in support of the claim for solicitor-client privilege and the Respondent must consequently advance its own evidence refuting the claim of privilege. Since the latter has not, the Applicant submits the solicitor-client privilege claim should be sustained: *Watt v Baycrest Hospital*, [1991] OJ No. 1107 at p. 2 (Gen. Div.) (*Watt*).

[20] The Applicant also points out solicitor-client privilege is a constitutional right recognized by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. The Applicant submits that the privilege is absolute and will only yield in defined circumstances. It does not involve a balancing of interests on a case by case basis: *Lavallee, Rackel & Heintz v Canada (Attorney General)* 2002 SCC 61, [2002] 3 SCR 209 at para 36 (*Lavallee, Rackel & Heinz*).

[21] The Applicant submits the Respondent is not entitled to any documents beyond those already provided by 108 Ltd. and, more specifically, the Respondent is not entitled to any documents in the Applicant's possession that are protected by solicitor-client privilege.

[22] The Respondent states that s. 231.2 requires the production of information and documents for any purpose related to the administration and enforcement of the *ITA*. The Respondent argues this is necessary in a self-reporting tax system since the Minister must be given broad powers to audit a taxpayer's returns, including inspection of all records which may be relevant to the preparation of those returns. Unless the material is subject to solicitor-client privilege, the Minister is entitled to review anything which may be relevant in verifying the tax liability of a taxpayer under audit: *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at para 33 (*McKinlay Transport*). I agree with this submission.

[23] The Respondent asserts it is not seeking documents protected by solicitor-client privilege. Rather, the Respondent "... seeks production of ... those documents in the Applicant's file that are not subject to solicitor-client privilege because they pertain to acts of counsel or statements of fact that are located in Mr. Nesathurai's file or are document[s] exchanged between the Applicant and a third party".

[24] The Respondent argues acts of counsel or mere statements of fact, as well as communications with third parties are not subject to solicitor-client privilege. While statements of account are generally held to be privileged, trust ledgers and other financial reports of that type are

not privileged: *Stevens v Canada (Prime Minister)* [1998] 4 FC 89 (FCA) at paras 27, 42-43 (*Stevens*).

[25] The Respondent adds the party asserting solicitor-client privilege must provide evidence the documents are privileged. It submits that, other than making an assertion that all the documents in his file is covered by solicitor-client privilege, the Applicant has not provided any evidence to support that statement. Further, the Respondent has not been able to make any assessment of the validity of that assertion as the Applicant has declined to provide a list of the documents over which privilege is asserted.

[26] The starting point for any analysis is section 231 of the *ITA*, in particular:

“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 deemed not to be such a communication.

[27] The classic definition of solicitor-client privilege can be found in *Wigmore on Evidence* (McNaughton rev. 1961) at para 2292:

Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

[28] Solicitor-client privilege is one of the few nearly absolute class privileges recognized at common law: *R. v McClure*, [2001] 1 SCR 445 at paras 27-28.

[29] The Supreme Court has recognized solicitor-client privilege as a right protected by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). In *Lavallee, Rackel & Heintz*, the Supreme Court declared a section of the Criminal Code permitting searches of law offices violated the section 8 of the *Charter*. The Court wrote at para. 49:

Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.

[30] At the same time, a distinction must be recognized between the lawyer's ethical duty to keep matters concerning a client confidential and the concept of solicitor-client privilege. The distinction between confidentiality and privilege was recognized in *Solosky v Canada*, [1980] 1 SCR 821, (1979) 50 CCC (2d) 495 (*Solosky*), at p. 502:

... it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected.

[31] In *R v B*, [1995] 3 BCLR (3d) 363, 5 WWR 374 (BCSC) Justice Thackray canvassed the law concerning this distinction. His comments at paras 26 and 27 are apt:

I find helpful the following passage from Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) [pp. 626-27]:

Although confidentiality is the cornerstone for the protection of communications within particular relationships, confidentiality alone is not sufficient to attract privilege.

Confidentiality may well attract other legal and ethical rights and obligations but it does not have its foundation in the evidentiary doctrine of privilege.

Evidence law does not concern itself with the ethical requirement upon a professional such as a lawyer to hold in strict confidence all information acquired in the course of his or her professional relationship concerning the business and affairs of a client. The lawyer has a professional duty not to divulge such information without the client's approval or unless required by law to do so. This ethical rule is wider than the evidentiary solicitor-client privilege and applies without regard to the nature of the source of the information or the fact that others may share the knowledge. Where there is a stronger public interest in disclosure, it will override the professional duties of confidence. [Footnotes omitted.]

In spite of the difficulty in defining the concepts of confidentiality as distinct from privilege, I am satisfied that there is a distinction. It is not enough, in my opinion, to establish only confidentiality in order to effect non-disclosure. It is only those documents that are privileged that are subject to non-disclosure.

[32] There are also limits to solicitor-client privilege. It does not apply if the privilege has been waived. Further, there are exceptions: privilege does not apply to communications in which legal advice is neither sought or offered, nor where the communication is not intended to be confidential and not where a client seeks the assistance or advice of a lawyer in order to facilitate the commission of a crime or a fraud: *Solosky*, above.

[33] In *Descoteaux*, the Supreme Court of Canada identified limitations to solicitor-client privilege at para 71:

... This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established.

(emphasis added)

[34] Finally, paragraph 231.2(1) of the ITA provides a statutory clarification of the limitation with respect to a lawyer's records: "... except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication."

[35] An issue may also arise with documents exchanged between a lawyer and third parties. In *Copthorne Holdings Ltd v Canada*, 2005 TCC 491 (*Copthorne Holdings*), a Tax Court case, Mr. Chief Justice Rip considered whether privilege attached to four types of communications between a lawyer and others. Of relevance are communications between a law firm and third parties. The Court found if the third party was an agent of the law office, then the same privilege that applies to employees of the firm applies to agents. The Court relied in part on para. 14.71 of J. Sopinka, S.N. Lederman, and A.W. Bryant, *The Law of Evidence in Canada* (1999):

A lawyer, in the ordinary course of his or her practice, utilizes employees such as articling students, law clerks and secretaries. Communication to such agents for the purpose of facilitating the obtaining of legal advice is equally protected. The same can be said about the client's agents, so long as they are employed as his or her agents for the purpose of obtaining legal advice. That is so, notwithstanding that the agent may add something to the communication as a product of his or her own skill. [...] In *Goodman & Carr v. Minister of National Revenue*, an accountant's opinion was sent to the client's lawyer at the client's request. It was held not to be privileged because the agent was not an agent for the client seeking legal advice, but was really offering his own opinion. Because these

communications through agents are not normally made in a litigious atmosphere, this situation must be distinguished from the case where a third party is retained to obtain facts or to make a report to assist the client or his or her solicitor in litigation.

(emphasis added)

[36] Another distinction arises in *Maranda v Richer*, 2003 SCC 67 (*Maranda*) where the Supreme Court drew the distinction between facts and communications in paragraph 30:

...The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence (Stevens, *supra*, at para. 25). It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduit for transfers of funds (Re Ontario Securities Commission and Greymac Credit Corp. (1983), 41 O.R. (2d) 328 (Div. Ct.); Joubert, *supra*).

(emphasis added)

[37] In *Westra Law Office (RE)*, 2009 ABQB 391 (*Westra*) the court held that a signed agreement, such as a loan or a mortgage, is not privileged because they are “actions rather than communications directly related to the seeking, formulating or giving of legal advice.” That case involved three parties to a mortgage, purchaser (Gours), seller (Sharma) and mortgage company (ResMor). The Court wrote at para 43:

“Mr. Sharma has not demonstrated solicitor-client privilege over the documents held by Westra Law office pertaining to this real estate transaction as against the Gours or ResMor. The parties to the real estate transaction all used the services of Mr. Westra to effectuate the deal and each is entitled to be privy to the information he had respecting the arrangements pertaining to the others. The communications are not confidential as between the parties, so as to meet that condition of solicitor-client privilege, although they are

confidential vis a vis the outside world. However, the Gours and ResMor have waived any privilege that did exist as against the outside world. Documents that are communications between Mr. Westra and any of the three parties must be disclosed on that basis.”

(emphasis added)

[38] The questions when presented with the documents at issue will be whether or not they constitute a communication or some statement of fact. In *Belgravia Investments Ltd v R*, 2002 FCT 649, Justice Heneghan stated at paras 44-46:

In *Susan Hosiery Ltd.*, supra, the Exchequer Court distinguished between documents and the facts contained in those documents, for the purpose of recognizing privilege. President Jackett expressed himself on this point as follows at pages 5282-5283:

...the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privilege documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.

This statement of principle means that although certain documents may be protected against disclosure, facts contained in those documents, which otherwise may be discoverable, are not protected.

Furthermore, no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer. In *General Accident Assurance Ltd. v. Chrusz* (1998), 37 O.R. (3d) 790 (Ont. Div. Ct.) at page 796 (reversed on other grounds (2000), 45 O.R. (3d) 321 (Ont. C.A.)), the Court said “An original document that is clothed with no privilege does not acquire privilege simply because it gets into the hands of a solicitor.”

[38] The first question I have to address is how to proceed. The Applicant has provided an affidavit upon which he was cross-examined. Since he has declined to present a list with

information concerning the documents for which he asserts privilege, his evidence does not establish any or all the documents are covered by solicitor-client privilege. Not surprisingly, the Respondent has also provided insufficient evidence that any or all the documents in the Applicant's possession are not covered by privilege. In my view, neither Applicant nor Respondent has put sufficient evidence before me to resolve this issue on their submissions alone. In result, it is necessary that I examine the documents themselves to ascertain whether they are covered by solicitor-client privilege in accordance with the principles discussed above.

Documents under Solicitor-Client Privilege

[39] The Applicant has provided within his sealed envelope a numbered listing of documents and descriptions which, considering paragraph 232(5), I will follow without the accompanying description.

[40] I consider the following documents to be covered by solicitor-client privilege, and they may not be disclosed without the client's waiver or consent. My reason for finding privilege follows the listing of the exhibit numbers.

Exhibit	Author	Recipient	Date
1	Hari S. Nesathurai ("HSN")	Darko Vranich/Vrancor (the Client)	June 22, 2004

[41] The cover letter, legal opinion and appended documents prepared for 108 Ltd. are privileged legal advice. 108 Ltd. has not waived privilege for these documents.

2	HSN	Colin Hames of Continental Trust Corporation Limited	June 20, 2003
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[42] The cover letter to Colon Hanes of CTC conveys the legal opinion and appended documents for 108 Ltd. prepared in 2003. The Applicant testified in cross examination he acted for 108 Ltd., SIL and CTC. This legal opinion would not be privileged as between 108 Ltd., SIL and CTC but is privileged in regard to outside persons unless waived by one of the three clients. As there is no evidence of waiver by 108 Ltd, SIL or CTC, this document remains privileged.

7-30	HSN and Tyler McDiarmid	Tyler McDiarmid and HSN	June 18, 2007 to November 24, 2008
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[43] The initial email correspondence beginning with the Exhibit 7 involves a request for information which arguably relates to financial information rather than legal questions. In Exhibit 10, there is a request by 108 Ltd. for another copy of HSN's invoice which is eventually provided. In my view, if it weren't for the disclosure by 108 Ltd. in its own response to the requirement served on it by Respondent, the correspondence would have been privileged, given the client's request and the Applicant's provision of the invoice. Accordingly, because of the waiver, I do not think privilege arises on this ground.

[44] However, this correspondence, Exhibits 7 – 30, evolves into exchanges about the Respondent's requirement leading to the Applicant's provision of legal advice concerning solicitor-client privilege. In *Descoteaux*, the Supreme Court noted confidentiality attaches to all communications within the framework of solicitor-client relationships as soon as the client takes the

first steps. In result, I find all the communications contained in the entire sequence, Exhibits 7 – 30, to be privileged.

31	HSN	Client, 1082955 Ontario Limited	October 4, 2005
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[45] The invoice by the Applicant for legal services is privileged as it identifies the subject matter for which legal services were provided to 108 Ltd. The privilege has not been waived by 108 Ltd., unlike the June 2004 Invoice referred to in the above in document email correspondence. I conclude this document is privileged.

Documents not under Solicitor-Client Privilege

[46] I turn now to those documents I do not consider to be privileged.

3	HSN	Darko Vranich/Vrancor	June 2005
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[47] The above description states the document “missing the actual reporting letter as per Exhibits 1 and 2 above.” The document only includes a Deed of Settlement made June 1, 2005 between SIL and CTC with attachments. While the Deed of Settlement is between parties who are subject to the Respondent’s audit, the subject matter concerns 108 Ltd. and falls within the broad scope of subsections 231.2(1) as discussed in paragraph 22 above.

[48] The document and attachments in Exhibit 3 are essentially similar to the above mentioned appended documents in Exhibits 1 and 2. It involves an agreement between the two offshore parties

who the Applicant says are his clients also. The subject matter touches on the broad scope of matters relevant to 108 Ltd.'s taxable status. However, there are three significant differences. First, not only is there no covering letter, there is also there is no legal opinion. Second, there is no evidence, either in the Applicant's affidavit or in his cross examination, that these documents were part of a legal opinion provided to 108 Ltd., SIL or CTC. There is only the unsworn assertion in the listing of documents which does not have any weight as evidence. Finally, the appended documents in Exhibits 1 and 2 included unsigned documents. Here the Deed of Settlement and attachments are signed and complete in that respect.

[49] I conclude that the document in Exhibit 3 comes with a statement of fact as discussed in *Maranda* and *Westra* rather than a communication given in the course of formulating or providing professional advice. I conclude this document is not covered by solicitor-client privilege.

4-6	HSN and Tyler McDiarmid	HSN and Tyler McDiarmid	June 18, 2007
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[50] These emails involve discussion of financial matters without any indicia or suggestion that legal advice is being sought or given. They also were sent on one day, June 18, 2007 approximately six months before the remaining emails in Exhibits 7 to 30. They clearly constitute a separate batch of emails. I conclude these emails fall outside the framework of the solicitor-client relationship as described in *Descoteaux*.

Conclusion

[51] I conclude the documents identified as being subject to solicitor-client privilege, the documents in Exhibits 1, 2, 7 to 30 and 31 are exempt from disclosure pursuant to paragraph 232(5)(b)(i) of the *ITA*.

[52] The documents not identified as being covered by solicitor-client privilege, the documents in Exhibits 3 and 4 to 6, are not exempt from disclosure under the paragraph 231.2(1)(a) and (b) of the *ITA*.

[53] For the protection of the Applicant and his client 108 Ltd., all documents shall remain under seal until the expiry of the applicable appeal period. Upon expiry of the appeal period and upon no appeal being filed, the Applicant will provide the documents in Exhibits 3 and 4 to 6 to the Respondent.

[54] There will be no order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The documents identified as being subject to solicitor-client privilege, in Exhibits 1, 2, 7 to 30, and 31 are exempt from disclosure pursuant to paragraph 232(5)(b)(i) of the *ITA*.
2. The documents not identified as being covered by solicitor-client privilege, in Exhibits 3, and 4 to 6, are not exempt from disclosure under the paragraph 232.1(2)(a) and (b) of the *ITA*.
3. For the protection of the Applicant and his client 108 Ltd., all documents shall remain under seal until the expiry of the applicable appeal period. Upon expiry of the appeal period and upon no appeal being filed, the Applicant will provide the documents in Exhibits 3 and 4 to 6 to the Respondent.
4. There will be no order for costs.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-88-09

STYLE OF CAUSE: TAXPRO PROFESSIONAL CORPORATION AND
HARI NESATHURAI and
THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 1, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN J.

DATED: FEBRUARY 24 , 2011

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