Docket: 2003-3382(GST)G

BETWEEN:

506913 N.B. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2003-3383(GST)G

AND BETWEEN:

CAMBRIDGE LEASING LTD.

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Before: The Honourable Justice Steven K. D'Arcy

Counsel for the Appellants:	Eugene J. Mockler Kevin Toner
Counsel for the Respondent:	John P. Bodurtha Jan Jensen Deavon Peavoy

---

EDITED VERSION OF TRANSCRIPT
OF ORAL REASONS FOR ORDER

Let the attached edited transcript of the Reasons for Order, delivered orally from the Bench on April 16, 2012, at Fredericton, New Brunzwick, be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity, and accuracy. I did not make any substantive changes.

Signed at Ottawa, Canada, this 8th day of June, 2012.

"S. D'Arcy"

D'Arcy J.

Citation: 2012TCC210
Date: 20120608
Docket: 2003-3382(GST)G

BETWEEN:

506913 N.B. LTD.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2003-3383(GST)G

AND BETWEEN:

CAMBRIDGE LEASING LTD.

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

(Motion heard on April 2, 3 and 5, 2012 and
Reasons for Order delivered orally from the bench
on April 16, 2012, in Fredericton, New Brunswick.)

D'Arcy J.

[1] The Respondent has brought a Motion to strike out certain Affidavits that have been filed by the Appellants in support of their Motion dated January 31, 2012 or, in the alternative, striking out certain specified paragraphs together with any associated Exhibits.

[2] These are my oral Reasons for the Order with respect to the Respondent's Motion.

[3] The Appellant, 506913 N.B. Ltd., is appealing from a notice of reassessment issued by the Minister for its GST reporting periods ending between May 1, 1998 and October 31, 2000. The reassessments increased 506913 N.B. Ltd.'s net tax by $5,627,882. The Minister also assessed penalties and interest of $1,253,746 and gross negligence penalties of $1,374,854.

[4] The Appellant, Cambridge Leasing Ltd, is appealing from a notice of assessment issued by the Minister for its GST reporting periods ending between November 1, 2000 and December 31, 2000. The reassessments increased Cambridge Leasing Ltd.'s net tax by $498,031. The Minister also assessed penalties and interest of $51,934 and gross negligence penalties of $124,508.

[5] A pre-trial conference was held before me on January 28, 2011. On February 7, 2011, I issued an Order providing for the filing by the Appellants of a Motion to challenge the admissibility of certain documents.

[6] The Appellants filed a Motion on February 28, 2011. The Motion did not comply with my February 7, 2011 Order.

[7] On March 23, 2011, I issued a second Order directing the Appellants to withdraw the Motion they filed on February 28, 2011 and to file a new Motion consistent with my Order of February 7, 2011. The Court also provided detailed directions with respect to the content of the new Motion.

[8] The Appellants filed the new Motion with the Court on February 3, 2012 (the "Main Motion").

[9] The Respondent then filed this Motion on March 15, 2012.

[10] These are not the only legal proceedings relating to the transactions in respect of which the Appellants were assessed.

[11] The Appellants, together with Mr. Mark Daley, were subjected to criminal proceedings before the New Brunswick Provincial Court (the "Criminal Proceedings").

[12] Further, the Appellants and their principals have brought a civil action against individual employees of the Canada Revenue Agency (the "CRA") and the Attorney-General of Canada in the Court of Queen's Bench of New Brunswick (the "Civil Action").

[13] There are three issues raised in the Motion before me:

(i) The Respondent is asking the Court for an Order prohibiting the Appellants from using or attempting to use any documents containing legal advice from the Department of Justice to the CRA or its employees (the "solicitor-client privilege issue").

(ii) The Respondent is asking the Court for an Order prohibiting the Appellants from using the transcript of the discovery of Mr. Ron MacIntyre that occurred in the Civil Action (the "implied undertaking issue").

(iii) The Respondent is asking the Court to strike specific portions of various Affidavits filed in support of the Main Motion on the ground that the noted portion is offensive for one or more of the following reasons:

a. it contains statements of the deponent's information and belief where the source of the information and fact of the belief are not specified in the Affidavit;

b. it constitutes a paragraph that contains no facts;

c. it contains statements that are irrelevant;

d. it contains statements that constitute speculation or argument; and/or,

e. it contains statements that constitute conclusions of law. (the "Affidavit content issue").

I will first address the solicitor–client privilege issue

[14] The Respondent is asking the Court to issue an order prohibiting the Appellants from using or attempting to use any documents containing legal advice from the Department of Justice to the CRA or its employees.

[15] The Respondent filed, with her Motion, the Affidavit of Ms. Barb Toole, who is currently the Assistant Director of Audit in the Saint John, New Brunswick office of the CRA.

[16] Ms. Toole identified and attached to her Affidavit the following six documents, in respect of which the Respondent specifically claims privilege notwithstanding their disclosure to the Appellants:

i) a September 12, 2001 memo from Department of Justice lawyer John Ashley to CRA official Francois LePalme;

ii) a May 10, 2004 letter from Department of Justice lawyer Peter Leslie to Francois LePalme;

iii) an April 11, 200 1etter from Mr. Leslie to CRA official Brian McGiven;

iv) a series of email correspondence between Ms. Toole and CRA official Gilles Meloche. The emails were sent in March and April 2001;

v) a facsimile transmission cover page dated November 15, 2000. The fax was sent by Mr. Leslie to CRA official, Yvon Boudreau; and,

vi) an April 14, 1999 letter from Mr. Leslie to CRA officials Leonard Doncaster and Tim MacLean.

[17] During the hearing, the Respondent's counsel identified two other documents that are part of the Appellants' filings in the Main Motion (Exhibits U and V of Volume 4A of 4):

i) a June 24, 2004 letter from Mr. Leslie to CRA official Ron MacIntyre; and,

ii) a July 2, 2003 letter from Mr. Ashley to CRA official Steven Lunney.

[18] It is the Respondent's position that the documents listed in Ms. Toole's Affidavit, the two letters identified during the hearing and any other similar documents disclosed to the Appellants are protected by solicitor-client privilege and were inadvertently provided to the Appellants during the disclosure process in the Criminal Proceedings.

[19] It is the Respondent's position that there was no implied waiver of the privilege despite the inadvertent disclosure.

[20] The Appellants argue, in the first instance, that the documents are not protected by solicitor-client privilege. If the documents are covered by that privilege the Appellants argue that the Respondent waived the privilege.

[21] I will first consider the issue of whether the documents are protected by solicitor-client privilege.

[22] As the Supreme Court of Canada noted in *R. v. Couture*, 2007 SCC 28, [2007] S.C.J No. 28, at para. 62; privilege excludes evidence on the basis of broad social interests, rather than facilitating the truth-finding function of a court.

[23] The rational for the rule is explained in the *Law of Evidence in Canada*[1] as follows[2]: Society has an interest in preserving and encouraging particular relationships in the community, the viability of which rely on confidentiality between the parties. These confidential communications are not typically disclosed to someone outside the relationship. The solicitor-client relationship has long been considered one of these special relationships.

[24] Justice Dickson explained the operation of solicitor-client privilege in *Solosky v. R.*, [1980] 1 S.C.R. 821 ("*Solosky*") at para 28:

> …privilege can be claimed only document by document, with each document being required to meet the criteria for the privilege: (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

[25] The *Law of Evidence* text notes the following with respect to the scope of the privilege:

i) The communication must not only be made within the "usual and ordinary scope of professional employment"[3] between solicitor and client, but also must be made confidentially.

---

1 3rd ed. by Bryant, Lederman and Fuerst, (Markham, Ontario: LexisNexis, 2009) (the "*Law of Evidence* text").

2 S*upra*, page 909 at para. 14.2.

3 S*upra*, page 931 at para.14.55.

ii) As long as the circumstances indicate the parties intend to keep the communication secret, the communication will be privileged[4].

iii) Communications must be made in the course of seeking legal advice[5] and made in order to elicit professional advice from the lawyer based on the lawyer's expertise in the law[6].

[26] The Supreme Court of Canada noted in *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 50 that the fact a lawyer works for an "in-house" government legal service does not affect the creation or character of the privilege.

[27] The Court noted that not every action of a government lawyer attracts the solicitor-client privilege. For example no solicitor-client privilege attaches to advice on purely business matters even when it is provided by a lawyer.

[28] The Court stated that the determination of whether solicitor-client privilege attaches in situations involving salaried employees such as government lawyers or corporate counsel depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

[29] This Court has held that legal advice given in confidence by a lawyer working for the Department of Justice to a CRA official is privileged (see *Global Cash Access (Canada) Inc. v. The Queen*, 2010 TCC 493, [2010] G.S.T.C. 145) ("*Global Cash Access (Canada) Inc*.").

[30] I have reviewed the six documents attached to Ms. Toole's Affidavit and the two letters identified during the hearing. I will first address the memorandum from Department of Justice lawyer John Ashley to the CRA official, the four letters from Department of Justice Lawyer Peter Leslie to various CRA officials, the fax transmission cover page and the letter from Mr. Ashley to a CRA official.

[31] After reading each of the documents, I have concluded that Mr. Ashley's memorandum and letter, each of Mr. Leslie's letters and the fax transmission cover page were, at the time they were issued, protected by the solicitor-client privilege. Each of the documents evidence communication between a solicitor and his client, entail the provision of legal advice and were intended to be confidential.

---

4 S*upra*, page 927 at para. 14.48.
5 S*upra*, page 935 at para. 14.71.
6 S*upra*, page 935 at para. 14.72.

[32] The emails attached as Exhibit 4 to Ms. Toole's Affidavit do not constitute communication between a solicitor and his or her client. However, the email that was sent at 7:32 am on April 17, 2001, by Ms. Toole to another CRA employee, Mr. Gilles Meloche, and the email that was sent at 4:55 pm on April 18, 2001 by Gilles Meloche to Ms. Toole discuss legal advice provided by Department of Justice lawyers to the CRA. It is clear that such legal advice was given in confidence and thus was subject to solicitor-client privilege when provided by the Department of Justice lawyer to the CRA official.

[33] This privilege is not lost when the advice is shared with other CRA officials. As Justice Bowie stated in *Global Cash Access (Canada) Inc*., *supra*, at paragraph 5:

> […] The advice was given to the Agency under the protective cloak of solicitor client privilege, and it does not lose that protection when it is passed from one officer of the Agency to another. If support for that proposition, other than common sense, is required, it may be found in the judgment of Halvorson J. in *International Minerals & Chemical Corp. (Canada) v. Commonwealth Insurance Co.*, [1990] S.J. 615; 89 Sask R.1 (Sask. Q.B.).

[34] The Respondent has requested that I grant an Order prohibiting the Appellants from placing before the Court other documents containing legal advice from the Department of Justice to the CRA or its employees. I cannot grant such an Order without first having the document in question identified.

[35] The decision with respect to whether privilege exists must be made on a document-by-document basis. Further, as Justice Dickson noted in *Solosky*, *supra*, the judge must read the relevant documents to make that decision. I must read the correspondence in question before I can make a decision with respect to privilege.

[36] In summary I find that Mr. Ashley's memorandum and letter, each of Mr. Leslie's letters, the fax transmission cover page and the two noted emails were, at the time they were issued, protected by the solicitor-client privilege.

[37] I will now address the issue of whether this privilege was lost when the Respondent disclosed the documents to the Appellants in the course of the Criminal Proceedings.

[38] The *Law of Evidence* text makes a number of comments with respect to the duration of privilege. It notes that privilege is "jealously guarded": it is only set aside in unusual circumstances. The duration of the solicitor-client privilege is permanent:

it continues even with respect to other litigation arising in the future[7]. Nevertheless, the privilege may be lost or "waived" on a communication.

[39] Further, the law is clear. The privilege belongs to the client: a solicitor may not waive the privilege. Only a client may waive the privilege.

[40] In the current Motion, the Respondent admits that it made inadvertent disclosure of the privileged documents.

[41] Originally, at common law, inadvertent disclosure of privileged information constituted a complete waiver of privilege. The rule was established in *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.). However, modern cases are not as rigid. Inadvertent or negligent disclosure no longer automatically waives privilege.

[42] One of the leading cases on inadvertent disclosure is the decision of the New Brunswick Court of Appeal in *Chapelstone Developments Inc. v. R.*, 2004 NBCA 96, [2004] G.S.T.C. 162 ("*Chapelstone*").

[43] At paragraph 54 of his decision in *Chapelstone*, Justice Robertson quotes the second edition of *the Law of Evidence* as follows:

> Where the disclosure of privileged information is found to have been inadvertent, recent Canadian cases have chosen not to adhere to the principle in *Calcraft v. Guest*, holding that mere physical loss of custody of a privileged document, does not automatically end the privilege. With rules of court now providing for liberal production of documents, the exchange of large quantities of documents between counsel is routine and accidental disclosure of privileged documents is bound to occur. A judge should have a discretion to determine whether in the circumstances the privilege has been waived. Factors to be taken into account should include whether the error is excusable, whether an immediate attempt has been made to retrieve the information, and whether preservation of the privilege in the circumstances will cause unfairness to the opponent.
>
> [Footnote omitted]

[44] Justice Robertson continued and summarized the law as follows[8]:

---

7 *Supra*, page 951 at para. 14.111.

8 *Chapelstone, supra*, at para 55.

> In summary, the general rule is that the right to claim privilege may be waived, either expressly or by implication. However, inadvertent disclosure of privileged information does not automatically result in a loss of privilege. More is required before the privileged communication will be admissible on the ground of an implied waiver. For example, knowledge and silence on the part of the person claiming the privilege and reliance on the part of the person in receipt of the privileged information that was inadvertently disclosed may lead to the legal conclusion that there was an implied waiver. In the end, it is a matter of case-by-case judgment whether the claim of privilege was lost through inadvertent disclosure.

[45] It appears that the privileged documents attached as Exhibits 1 to 5 of Ms. Toole's Affidavit and the two privileged letters identified during the hearing, were disclosed in June 2005 during the Criminal Proceedings.

[46] It is not clear to me how the Appellants acquired a copy of the privileged letter attached as Exhibit 6 to Ms. Toole's Affidavit. The letter does not appear to relate to either of the Appellants or their employees or shareholders. It was written by Mr. Leslie to CRA officials in Sydney and Halifax, Nova Scotia.

[47] With respect to Exhibits 1 to 5 of Ms. Toole's Affidavit and the two letters identified during the hearing, I accept Ms. Toole's testimony that the disclosure was inadvertent.

[48] The CRA disclosed approximately 70,000 documents to the Appellants. It is not surprising that there was inadvertent disclosure of at least 7 documents.

[49] With respect to Exhibit 6 to Ms. Toole's Affidavit, I am troubled that the Court was not made aware of how the document came into the Appellants' possession. However, it was clearly provided to the Appellants by the CRA at some point in time.

[50] I note that a portion of this document is redacted. Such redaction supports the Appellants' argument that the disclosure of this document was not inadvertent.

[51] Ms. Toole testified that the CRA would not, in the normal course of its business, disclose documents that contained communication between Department of Justice lawyers and the CRA.

[52] After considering all of the evidence before me, I have decided to accept the evidence of Ms. Toole. The disclosure of Exhibit 6 to her Affidavit was inadvertent.

[53] As I just noted, the disclosure of seven of the documents occurred in June 2005.

[54] The Crown was aware of the inadvertent disclosure as early as September 2006.

[55] On September 1, 2006, an Affidavit sworn by Mr. David Daley was filed in the Criminal Proceedings. Attached to the Affidavit were the privileged documents marked as Exhibits 1, 3 and 6 of Ms. Toole's Affidavit.

[56] On September 11, 2006, Mr. Daley swore another Affidavit that was also filed in the Criminal Proceedings. The privileged document attached as Exhibits 2 of Ms. Toole's Affidavit and the two privileged letters identified during the hearing were attached to Mr. Daley's Affidavit.

[57] Each of the remaining two Exhibits to Ms. Toole's Affidavit, Exhibits 4 and 5, were marked as Defendants Exhibits during the Criminal Proceedings.

[58] The Crown did not raise any objection before the New Brunswick Provincial Court to the privileged documents being filed during the proceedings before the Court.

[59] In fact, the document attached as Exhibit 3 of Ms. Toole's Affidavit is referred to at paragraph 14 of the July 30, 2008 decision of Judge Arseneault in the Criminal Proceedings.

[60] Further, the emails attached as Exhibit 4 to Ms. Toole's Affidavit that were sent at 7:32 am on April 17, 2001 by Ms. Toole to Mr. Meloche and at 4:55 pm on April 18, 2001 by Mr. Meloche to Ms. Toole were put to a CRA official in 2009 during discovery in these proceedings.

[61] Once again the Respondent did not object on the ground that the documents were privileged documents that had been inadvertently disclosed.

[62] In summary, the inadvertent disclosure occurred nearly seven years ago. On at least three occasions, beginning five and a half years ago, the inadvertent disclosure was brought to the attention of the Respondent. However, the Respondent did not raise any objections in relation to these documents until October 2011.

[63] In my view, the knowledge and silence on the part of the Respondent constituted an implied waiver of the solicitor-client privilege as to the documents attached to Ms. Toole's Affidavit and the two privileged letters identified during the hearing of this Motion.

The next issue is the Discovery evidence from the Civil Action

[64] CRA official Ron MacIntyre was discovered during the Civil Action. He is one of the defendants in the action.

[65] The Appellants filed an Affidavit of Mr. Allen Skaling sworn on January 27, 2012 in support of the Main Motion ("the 2012 Skaling Affidavit").

[66] Paragraphs 14, and 15 of the 2012 Skaling Affidavit contain extensive quotes from the transcript of the discovery of Mr. Skaling in the Civil Action. Paragraph 5(d) and 16 are based upon the discovery transcript.

[67] The entire transcript of the discovery of Mr. Skaling in the Civil Action is attached as Exhibit 6 to the 2012 Skaling Affidavit.

[68] It is the Respondent's position that the use by the Appellants of the transcript from the discovery in the Civil Action breaches the implied undertaking rule.

[69] The implied undertaking rule was discussed at length in the recent decision of the Supreme Court of Canada, *Juman v. Doucette*, 2008 SCC 8, [2008] 1 S.C.R. 157 ("*Juman*"). Justice Binnie stated the rule as follows at paragraph 27:

> For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature). […]

[70] He noted that there are two good reasons for the rule[9]:

> In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to

---

9 *Supra*, at paras 24 and 26.

> encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. […]
>
> > […] second rationale […]: A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production. […]

[71] The implied undertaking rule was recognized by the New Brunswick Court of Queen's Bench in 1989 in *Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd.* 103 N.B.R. (2nd) 224 ("*Rocca Enterprises Ltd*.") at para 24 where the Court stated the following:

> […] I do however accept that the law in New Brunswick is set out by Anderson J. in *Reichmann* […] as follows:
>
> > There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes. […]

[72] Appellants' counsel accepts that the implied undertaking rule applies in New Brunswick. This is not surprising since he was counsel for the plaintiff in the *Rocca Enterprises Ltd*. hearing.

[73] Counsel for the Appellants argues that the implied undertaking rule does not apply in the Main Motion on the ground that there is no privacy interest to be protected.

[74] I do not agree. The implied undertaking arises once discovery occurs.

[75] A party may raise the privacy issue when seeking leave to have the undertaking waived; however, privacy is not a condition for the imposition of the undertaking in the first instance.

[76] The Appellants have clearly breached the implied undertaking by filing the oral discovery of Mr. MacIntyre without the consent of Mr. MacIntyre or leave of the New Brunswick Court of Queen's Bench.

[77] The Appellants argue that I should allow the oral discovery to be filed, relying on one of the exceptions set out by the Supreme Court in *Juman*. However, the Appellants have not brought a Motion seeking leave to file the oral discovery of Mr. MacIntyre.

[78] Regardless, this Court does not, in my view, have jurisdiction to grant leave to file the oral discovery.

[79] It is clear from the Supreme Court of Canada decision that the implied undertaking is owed to the Court where the proceeding took place: in this instance, the New Brunswick Court of Queen's Bench.

[80] As a result, it is the New Brunswick Court of Queen's Bench that has jurisdiction to grant leave, not the Tax Court of Canada.

[81] As my colleague Justice Angers stated in *Welford v. the Queen*, 2006 TCC 31, 2006 D.T.C. 2353, at para. 19:

> It seems to me that if the proceeding giving rise to the application of the implied undertaking rule was before the Ontario Superior Court of Justice and one of the parties to that proceeding wants to use in the Tax Court an examination for discovery from that proceeding, it is the Ontario Superior Court of Justice that would have the power to permit the production of the document protected by the implied undertaking rule and to release the party from that undertaking.

[82] For the foregoing reasons, the Respondent's Motion with respect to the oral discovery of Mr. Macintyre in the New Brunswick Court of Queen Bench is granted. Paragraphs 5(d), 14, 15 and 16 of the Affidavit of Allen Skaling sworn on January 27, 2012 shall be struck together with Exhibit 6 to the Affidiavit.

The last issue I will address is the Affidavit content issue

[83] The Respondent is asking the Court to strike specific portions of various Affidavits filed in support of the Main Motion on the ground that the noted portion is offensive for one or more of the following reasons:

(i) it contains statements of the deponent's information and belief where the source of the information and fact of the belief are not specified in the Affidavit;

(ii) it constitutes a paragraph that contains no facts;

(iii) it contains statements that are irrelevant;

(iv) it contains statements that constitute speculation or argument; and/or,

(v) it contains statements that constitute conclusions of law.

[84] Rule 72 of the *Tax Court of Canada Rules (General Procedure)* provides that:

> An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

[85] Rule 72 is an exception to General Procedure subrule 19(2) which states:

> An affidavit shall be confined to a statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in Court, except where these rules provide otherwise.

[86] As Justice Trudel stated in *Canada (Attorney General) v. Quadrini*, 2010 FCA 47 at paragraph 18:

> […] the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions, or where the Court is convinced that admissibility would be better resolved at an early stage so as to allow the hearing to proceed in a timely and orderly fashion […].

[87] I agree with the Respondent that the Affidavits in question are filled with speculation, opinions, arguments and legal conclusions.

[88] I also agree with the Respondent that the Affidavits contain hearsay where the source of the information and fact of the belief are not specified.

[89] Further, it is not clear to me, at this stage, the relevance of certain portions of the Affidavits.

[90] The first issue that I must address is how to deal with those deficiencies in the Affidavits.

[91] I will first address the statements of the deponent's information and belief where the source of the information and fact of the belief are not specified in the Affidavits.

[92] I believe that any such deficiencies in the Affidavits go to the weight I should give the statements, with such determination being made after I have heard from the Appellants on the Main Motion. It is only after I have heard from the Appellants that I can determine whether the hearsay evidence in question should be admitted under the principled approach set out by the Supreme Court of Canada in *R v. Khelawon*, 2006 SCC 57 or one of the exceptions to the hearsay rule.

[93] I will next address the relevancy issue.

[94] The Respondent's counsel is asking me to strike out numerous paragraphs and sentences which he argues are irrelevant.

[95] Counsel for the Appellants argues that I should not make a determination with respect to relevancy until after he has presented his case to me and attempted to show me the connection between the items noted in the Affidavits and his argument.

[96] I agree with counsel for the Appellants. It is only after I have heard from the Appellants that I can made a determination with respect to relevancy.

[97] The Respondent is also requesting that I strike numerous paragraphs that contain no facts. The dependent used each of the noted paragraphs to attach documents.

[98] There is no reason to strike the paragraphs. This issue is what weight I should give to the attached documents. I will make that decision after I hear from both parties during the Main Motion.

[99] With respect to the speculation, opinions, arguments and legal conclusions contained in the Affidavits, the usual remedy is to strike out the offensive portions of the Affidavit. However, if the relevant portions are not severable then the entire Affidavit is struck.

[100] After reviewing each of the Affidavits, I have determined that a number of the statements constitute speculation, opinions, arguments and/or legal conclusions.

[101] Statements that are severable will be struck.

[102] As a result, with respect to the 2012 Skaling Affidavit:

a) The first sentence of paragraph 9, which begins with the following words: “Although the CRA maintains that it exercised its audit powers in a regulatory capacity…” is struck;

b) The first sentence of paragraph 11, which begins with the following words: “At that meeting, neither Mr. Crossman or Mr. MacIntyre had any concrete evidence…” is struck;

c) The following words from the fifth sentence of paragraph 13 are struck: “and he was accompanied by a number of his confreres and they seized numerous documents that had no relation to the assessment or potential criminal charges”;

d) The last sentence of paragraph 13, which begins with the following words: “I found this attitude totally unacceptable…” is struck;

e) The first sentence of paragraph 14, which begins with the following words: “The product of the search warrants was also...” is struck. This sentence is also struck under my ruling on the implied undertaking;

f) The first sentence of paragraph 15, which begins with the following words: “As additional or further evidence of the abusive conduct of CRA...” is struck. This sentence is also struck under my ruling on the implied undertaking; and,

g) The following words from the first sentence of paragraph 19 are struck: “and having concluded that they were now firmly involved in a criminal investigation”.

[103] With respect to the Affidavit of David Daley sworn on February 24, 2011:

a) the following words from the first sentence of paragraph 12 are struck: “all for the purpose of using such evidence to support the validity of the assessments herein”;

b) The second sentence of paragraph 14, which begins with the following words: “In short, I state that it appears any alleged...” is struck;

c) Paragraph 16 is struck;

d) The following words from the second sentence of paragraph 18 are struck: “and the evidence shows that Mr. McIntyre of CRA and RCMP officials and Department of Justice lawyers were fully aware of the potential breaches of the law in the mixing of audit and investigative functions”;

e) The fifth sentence of paragraph 20, which begins with the following words: “It is not possible for me to prove...” is struck;

f) The second sentence of paragraph 23, which begins with the following words: “A trial involving the validity of the assessments herein...” is struck.

[104] With respect to the Affidavit of David Daley sworn on September 1, 2006, which was reaffirmed by Mr. Daley in his February 24, 2011 Affidavit:

a) Paragraph 29 is struck;

b) The last sentence of paragraph 33, which begins with the following words: “I ask the Court to consider...” is struck;

c) The last sentence of paragraph 40, which begins with the following words: “The Minister has no proof for these allegations...” is struck;

d) The second sentence of paragraph 42, beginning with the words “The Ministry has no proof that Nautica Motors Inc.”, and the two sentences that follow are struck;

e) The first sentence of paragraph 54, which begins with the following words: “I note that in the Information to search...” is struck;

f) Paragraphs 107, 115 and 118 are struck.

[105] With respect to the Affidavit of David Daley sworn on February 13, 2007, which was reaffirmed by Mr. Daley in his February 24, 2011 Affidavit:

a) Paragraph 20 is struck.

[106] Certain statements contained in the Affidavits, that constitute speculation, opinions, arguments and/or legal conclusions are not severable. These statements were identified by counsel for the Respondent and are contained in paragraphs 7 and

8 of the 2012 Skaling Affidavit and paragraph 9 of the 2011 Daley Affidavit. Such statements will not be struck, however they will be ignored by the Court.

[107] Since the Motion is only granted in part, there will be no order with respect to costs.

D'Arcy J.

CITATION:	2012TCCxxx
COURT FILE NOs.:	2003-3382(GST)G, 2003-3383(GST)G
STYLES OF CAUSE:	506913 NB LTD. AND THE QUEEN and CAMBRIDGE LEASING LTD. AND THE QUEEN
PLACE OF HEARING:	Fredericton, New Brunswick
DATE OF MOTION:	April 2,3 and 5, 2012
REASONS FOR ORDER BY:	The Honourable Justice Steven K. D'Arcy
DATE OF ORDER:	April 16, 2012
DATE OF ORAL REASONS FOR ORDER:	April 16, 2012

APPEARANCES:

Counsel for the Appellants:	Eugene J. Mockler Kevin Toner
Counsel for the Respondent:	John P. Bodurtha Jan Jensen Deavon Peavoy

COUNSEL OF RECORD:

For the Appellant:

Name:	Eugene J. Mockler
Firm:	E.J. Mockler Professional Corporation Fredericton, New Brunswick

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada