Dockets: 2009-2430(IT)G
2010-3477(IT)G
2011-1909(IT)G
2013-3018(IT)G
2012-3256(IT)G
2013-3019(IT)G

BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motions heard on June 12 and September 26, 2013 at Toronto, Ontario.

Before: The Honourable Gerald J. Rip, Chief Justice

Appearances:

Counsel for the Appellant:	Joseph M. Steiner Pooja Samtani
Counsel for the Respondent:	Naomi Goldstein Elizabeth Chasson Diana N. Aird

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ORDER

Upon Motions by counsel for the respondent for Orders:

1. For service of Lists of Documents in accordance with Rule 82 of the *Tax Court of Canada Rules* (*General Procedure*) ("*TCC Rules*") in file Nos. 2010-3477(IT)G, 2011-1909(IT)G and 2012-3256(IT)G;

2. For service of a further and better List of Documents in file No. 2009-2430(IT)G;

3. In the alternative, for cross-examination on the List of Documents in file No. 2009-2430(IT)G;

4. For the respondent to conduct its discovery of the appellant commencing at a date six months following the service of the documents and Lists of Documents as ordered by this Court;

5. That the appeals for taxation years 2003, 2005 and 2006 be consolidated pursuant to Rule 26 of the *TCC Rules*; and

6. That the appellant delete documents relating to the appellant's appeals for 2004, 2005 and 2006 taxation years and identified as R-006976 and R-006191 from its database and replace them with redacted copies of the documents.

It is ordered that:

1. The Motions with respect to the appellant's appeals for 2004 (Court file No. 2010-3477(IT)G), 2005 (Court file Nos. 2011-1909(IT)G and 2013-3018(IT)G) and 2006 (Court file Nos. 2012-3256(IT)G and 2013-3019(IT)G) are quashed, except for the motion to consolidate the appellant's appeals for 2003, 2005 and 2006 which the respondent has withdrawn;

2. The appellant shall serve a further and better affidavit and List of Documents in accordance with Rule 82 of the *TCC Rules* in Court File No. 2009-2430(IT)G with respect to its appeal from an assessment for its 2003 taxation year, and in particular:

   i) the List of Documents shall contain all relevant and material documents in the appellant's possession, control or power that are not included on the List of Documents previously filed and served on the respondent;

   ii) the appellant shall identify the legal basis of redactions in documents included in Schedule "A" to the List previously filed and served; and

iii) the appellant shall describe all relevant and material documents over which solicitor-client privilege is claimed in Schedule "B" to the List of Documents previously filed.

3. The appellant shall serve a further and better affidavit of documents on the respondent not later than 30 days of this Order or such other date as the parties may agree and the Court approve upon written notice;

4. The respondent shall conduct its discovery of the appellant commencing not later than 120 days after service of the further and better affidavit of documents or upon other time as the parties may agree and the Court approve upon written notice; and

5. Costs shall be in the cause.

Signed at Ottawa, Canada, this 13th day of February 2014.

"Gerald J. Rip"

Rip C.J.

Citation: 2014 TCC 45
Date: 20140213
Docket: 2009-2430(IT)G

BETWEEN:

CAMECO CORPORATION,

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Docket: 2010-3477(IT)G

AND BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

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Docket: 2011-1909(IT)G

AND BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2012-3018(IT)G

AND BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2012-3256(IT)G

AND BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

Docket: 2013-3019(IT)G

AND BETWEEN:

CAMECO CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Rip C.J

Introduction

[1] These are three motions brought by the respondent in respect of appeals from assessments of tax to Cameco Corporation for its 2003, 2004, 2005 and 2006 taxation years. The Minister of National Revenue ("Minister") has challenged the prices Cameco has charged to, and was charged by, one or more subsidiaries for uranium. The motions are:

a) for an order for a better List of Documents with respect to the 2003 appeal and for a List of Documents for each of the 2004, 2005 and 2006 appeals (Rules 82 and 88 of the *Tax Court of Canada Rules* (*General Procedure*) ("*TCC Rules*"));

b) for the respondent to conduct its discovery of the appellant commencing at a date six months following the service of the documents and Lists of Documents as ordered by this Court;

c) that the appeals for taxation years 2003, 2005 and 2006 be consolidated pursuant to Section 26 of the *TCC Rules*; and

d) that the appellant delete documents relating to the appellant's appeals for 2004, 2005 and 2006 taxation years and identified as R-006976 and R-006191 from its database and replace them with redacted copies of the documents.

[2] The following are the dates of the notices of the reassessments for 2003, 2004, 2005 and 2006 that were appealed:

Taxation year	Date of the reassessment
2003	December 17, 2010
2004	December 23, 2010 (superceded by subsequent reassessment)
2005	July 25, 2013 (superceded)
2006	July 25, 2013 (superceded)

[3] In order to even attempt to explain the assessments made by the Minister and the appeals filed with the Court for Cameco's 2003, 2004, 2005 and 2006 taxation years, I have to burden the reader with a listing of assessments and appeals for each year. The myriad of reassessments have bearing on the motions:

a) The Minister's reassessment that triggered a Notice of Appeal for Cameco's 2003 taxation year was issued by notice dated February 27, 2009. Cameco filed a Notice of Objection to the reassessment and on July 22, 2009 filed a Notice of Appeal to this Court. The Minister issued a new reassessment for Cameco's 2003 taxation year by notice dated December 17, 2010. The appellant did not file a new Notice of Appeal from the December 17, 2010 assessment but, rather, filed an Amended Notice of Appeal on January 25, 2011. A Reply to the Amended Notice of Appeal was filed soon after. All pleadings for the appeal for 2003 are now closed.

b) The Minister issued several reassessments for Cameco's 2004 taxation year, notices of which are dated December 18, 2009, May 13, 2010, August 19, 2011, December 16, 2011 and December 23, 2011. Cameco objected to the reassessments of December 18, 2009 and May 13, 2010 on March 16, 2010 and August 11, 2010 respectively. Cameco filed a Notice of Appeal

on November 10, 2010 with respect to the May 13, 2010 reassessment. Cameco then amended its Notice of Appeal in response to the reassessment of August 19, 2011 and further amended its Amended Notice of Appeal on March 15, 2012 in response to the December 23, 2011 reassessment. The respondent replied to the Amended Amended Notice of Appeal on March 26, 2012. Later on, I am informed by counsel, the Minister again reassessed Cameco for its 2004 taxation year thus nullifying the reassessment of May 13, 2010. Cameco has objected to the latest reassessment.

c) With respect to Cameco's 2005 and 2006 taxation years: assessments for Cameco's 2005 and 2006 taxation years were issued by notices dated December 21, 2010 and December 23, 2011 respectively. Notices of Appeal were filed on June 17, 2011 and August 13, 2012 from reassessments for 2005 and 2006 respectively. An Amended Notice of Appeal for 2006 was filed on August 29, 2012. On December 21, 2012 the Minister reassessed both the 2005 and 2006 taxation years and Notices of Objection for both years were filed on March 22, 2013, which were confirmed by notices dated April 30, 2013. New Notices of Appeal for 2005 and 2006 were filed on July 25, 2013 and Replies were filed September 25, 2013. However, I was informed by appellant's counsel at a telephone conference that on December 28, 2013 the Minister again reassessed Cameco for 2005 and 2006. Counsel for Cameco has advised Crown counsel and me at the telephone conference that Cameco will be filing Notices of Objection to the outstanding reassessments for 2005 and 2006. I anticipate that new Notices of Appeal will follow eventually.

[4] On March 21, 2013, I issued a consent Order in the four appeals for 2003, 2004, 2005 and 2006 outstanding at the time that, among other things, "The parties will prepare a List of Documents (Full Disclosure) pursuant to Rule 82 of the *Tax Court of Canada Rules* (*General Procedure*) and will serve the list on the opposing party no later than April 30, 2013. Examinations for discovery were to be completed by September 30, 2013 and undertakings given at the examination were to be satisfied by November 29, 2013". The order was subsequently amended on August 9, 2013 to provide that examinations for discovery be completed by April 30, 2014.

[5] On June 12, 2013 I heard the first of the three motions by the respondent, that is, for a better List of Documents with respect to the appeal for 2003 and a List of Documents in accordance with Rule 82 with respect to the appeals for 2004, 2005 and 2006.

[6] Before I was able to begin to consider the merits of each of the motions, Cameco had filed new Notices of Appeals for 2005 and 2006 on July 25, 2013. The Minister had also reassessed Cameco for its 2004 taxation year. It was not apparent at the time I heard the motions on June 12, 2013 that Cameco had been reassessed again on December 21, 2012 for each taxation year. And, on December 28, 2013, the Minister yet again reassessed Cameco for its 2005 and 2006 taxation years.

[7] The Minister's reassessments of December 28, 2013 for Cameco's 2005 and 2006 taxation years replaced the reassessments of December 21, 2012 that had previously replaced the earlier reassessments for 2005 and 2006 that were originally appealed. With respect to the Notice of Appeal from the reassessment for Cameco's 2004 taxation year, an assessment was also superceded by another reassessment. The question is whether there are currently appeals before me for 2004, 2005 and 2006.

[8] There are none. I refer to *Abrahams v. M.N.R.*,[1] in which President Jackett, as he then was, explained that:[2]

> Assuming that the second re-assessment is valid, it follows, in my view, that the first re-assessment is displaced and becomes a nullity. The taxpayer cannot be liable on an original assessment as well as on a re-assessment. It would be different if one assessment for a year were followed by an "additional" assessment for that year. Where, however, the "re-assessment" purports to fix the taxpayer's total tax for the year, and not merely an amount of tax in addition to that which has already been assessed, the previous assessment must automatically become null.
>
> I am therefore, of opinion that, since the second re-assessment was made, there is no relief that the Court could grant on the appeal from the first re-assessment because the assessment appealed from had ceased to exist. There is no assessment, therefore, that the Court could vacate, vary or refer back to the Minister. When the second re-assessment was made, this appeal should have been discontinued[2] or an application should have been made to have it quashed[3].
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> 2 The appellant could have asked the respondent to agree to pay his costs as a condition to his discontinuing. If the respondent had refused, he could have applied for leave to discontinue on

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[1] 66 DTC 5451, per Jackett, at paras. 9 and 10.

[2] At paras. 9 and 10.

terms that the respondent be ordered to pay his costs of the appeal that had been made abortive by the second re-assessment.

3 An alternative view is that the appeal should be allowed and the assessment appealed from declared null. I am of the view that the correct view of the statute is that there is no basis for an appeal from an assessment that has become null by virtue of a re-assessment. Certainly such an appeal is unnecessary and it would be an unnecessary expense and expenditure of time and energy if the practice of taking such appeals developed.

[9] Both counsel agreed that Cameco was reassessed for its 2005 and 2006 taxation years, notices of which are dated December 28, 2013. They also agree that the 2004 taxation year was reassessed and the later reassessment is subject of a Notice of Objection that is currently being considered by the Minister. Since all previous reassessments are nullities as a result of the earlier reassessments having been displaced, so must the appeals from these assessments be nullities. Given the circumstances, the respondent's motion for Lists of Documents with respect to the appeals for 2004, 2005 and 2006 — appeals that no longer exist — must be quashed.

[10] The motion for an order to delete documents and replace them with redacted documents was with respect to appeals for 2005 and 2006 which are no longer valid. Therefore the application for the order to delete documents also will be dismissed. Similarly the respondent's application to consolidate the appeals for 2003, 2005 and 2006 would also be dismissed since there are no appeals for 2005 and 2006 to consolidate. However, by letter dated January 31, 2014 the respondent's counsel advised that the respondent "is withdrawing its motion for consolidation of the 2003, 2005 and 2006 appeals without prejudice to our ability to bring similar consolidation motion after the new notices of appeal have been filed. Our decision to withdraw is based on the appellant's representations that it intends on filing new Notices of Objection and new Notices of Appeal to the reassessments. Further to the case management conference held on January 30, 2014 we confirm that we intend on filing a new notice of motion for consolidation of the 2003, 2005 and 2006 years".

Better List of Documents – 2003

[11] The respondent's motion for service of a further and better List of Documents with respect to the appeal from the appellant's 2003 reassessment remains. Each party was to file and serve a List of Documents in accordance with Rule 82. This motion raises two issues. First, whether a further and better affidavit of document is warranted on the basis that the appellant has additional relevant documents in its possession; and second, whether the appellant has improperly made claims of solicitor-client privilege. Rule 88 provides a range of remedies available where

relevant documents may have been omitted or claims of privilege may have been improperly made. Rule 88 provides:

Where the Court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the Court may,	Si elle est convaincue qu'une partie n'a pas mentionné dans sa déclaration sous serment un document pertinent qui se trouve en sa possession, sous son contrôle ou sous sa garde ou que la prétention au privilège n'est pas fondée, la Cour peut :
(*a*) order cross-examination on the affidavit of documents,	*a*) ordonner qu'il y ait contre-interrogatoire sur la déclaration sous serment de documents;
(*b*) order service of a further and better affidavit of documents,	*b*) ordonner la signification d'une autre déclaration sous serment de documents plus complète;
(*c*) order the disclosure or production for inspection of the document or a part of the document, if it is not privileged, and	*c*) ordonner la divulgation ou la production, à des fins d'examen, du document, en tout ou en partie, si celui-ci n'est pas privilégié;
(*d*) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.	*d*) examiner le document afin d'établir sa pertinence ou de décider si la prétention au privilège est fondée.

[12] The respondent alleges that the List of Documents filed for the 2003 appeal does not contain all relevant documents in the appellant's possession, control or power. In addition, documents in Schedule "A" to the List of Documents contain redactions for which no legal basis is identified and Schedule "B" to the List of Documents does not properly describe all relevant documents over which solicitor-client privilege is claimed.

[13] Ms. Karen Hodges, a senior paralegal in the Tax Law Services Section of the Department of Justice, is responsible for much of the organization of the Cameco appeals. The Crown filed an affidavit of Ms. Hodges in support of its motions. Ms. Hodges' affidavit is subject to a confidentiality Order.

[14] Appellant's counsel delivered DVDs containing Cameco's documents to Ms. Hodges and she directed their uploading to Department of Justice computers in respect of the 2003 appeal. She also has reviewed a portion of Cameco's 136,499 documents. She has access to correspondence between the Department of Justice and Cameco's lawyers, Osler, Hoskin & Harcourt LLP ("Osler").

[15] At the end of April 2013, the Crown received from Osler 12 DVDs containing documents for the 2003 appeal. The last DVD consisting of about 15,000 documents was received on April 30, 2013. Subsequently the parties considered documentary disclosure, in particular the scope of each party's production and coding of each document, that is, in Ms. Hodges' words, "the type of information about each document that would be provided (i.e. titles, dates, source, to, from, etc.)". The majority of matters considered by the parties were not resolved.

[16] Ms. Hodges lists 26 documents missing from the appellant's production. She identified examples of four types of documents she was unable to locate after reviewing coding information provided by the appellant and full text documents using optical character recognition.

[17] The four types of documents include the following complaints:

a) authors and dates of documents on the List of Documents do not always correspond with the author and date on the face of the document referred to;

b) the appellant described some documents as "represented" and "selected" but without explanation;

c) some documents were claimed as privileged but without reason; and

d) some documents lacked signatures and the Crown could not determine if the documents were drafts or executed copies.

[18] Documents that the respondent identifies as missing include executed copies of agreements of draft versions listed in the affidavit. I am asked to consider whether the existence of draft documents is sufficient evidence that final copies of the documents, that is, executed copies have not been disclosed.

[19] Mr. Peter Macdonald, a lawyer at Osler was cross-examined on his affidavit opposing the motion. Mr. Macdonald was "directly" involved in the collection,

review and production of documents by Cameco along with exchanges with respondent's counsel with respect to Cameco's appeal for 2003.

[20] Mr. Macdonald replied that several documents cannot be located; that Cameco may not be in possession of signed copies of some of the documents, for example, letters sent to third parties; that an agreement was signed but a signed copy cannot be located. Also, while an electronic inter-office memorandum was identified the attachment referred to in the memorandum was not electronically attached to the document. Mr. Macdonald suggests that the respondent consider requesting the document at discovery although Cameco explained this type of issue in correspondence to the Crown.

[21] As far as Cameco producing "representative" and "selected" material and Ms. Hodges stating that the Crown has not been advised of their basis, Mr. Macdonald referred to correspondence to the Crown that it was providing production of documents "representative" of contract administrative files and "selected" contract sales within the Cameco Group, and the Crown's letter to Osler advising that it was "willing to forego, for the moment", certain files within the Cameco Group.

[22] Rule 88 of the *TCC Rules* is similar to Rule 30.06 of the Ontario *Rules of Civil Procedure*[3]. A review of reported cases relating to Rule 30.06 will assist in considering Rule 88, given that the Court's review of Rule 88 is limited.

[23] Rule 30.06 will apply where there is proof that relevant documents exist and have not been disclosed. The level of proof required by the party bringing the motion must take into account the fact that the moving party does not have access to the

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[3] Rule 30.06 provides that:

> 30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,
> (a) order cross-examination on the affidavit of documents;
> (b) order service of a further and better affidavit of documents;
> (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
> (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

other party's documents. However, speculation, intuition and guesswork that other documents exist is not sufficient or persuasive evidence.[4]

[24] Mr. Macdonald revealed that Osler has only made inquiries into documents that are in Osler's possession. Osler has not asked Cameco to search anew for documents that it may not have produced earlier or to otherwise confirm that it had produced all documents in accordance with Rule 82.

[25] The respondent's view is that the existence of draft copies of agreements is persuasive evidence that there is a reasonable probability that draft copies eventually resulted in formal, executed agreements.

[26] The appellant argued that a balanced approach is necessary and requests for documents must be reasonable when deciding whether or not to grant the motion for a further and better affidavit. In his affidavit, also subject to a confidentiality order, Mr. Macdonald estimated that over 14,000 hours have been spent by Osler and a third party on the collection, review and production of documents, encompassing the work of over 70 legal personnel. Cameco's costs have been substantial.

[27] In his affidavit, Mr. Macdonald described the process employed by Osler lawyers and its client to assemble and identify documents. Once it was apparent in Spring 2009 that litigation may ensue regarding transfer pricing in transactions between Cameco and a subsidiary of the Cameco Group of companies ("Cameco Group"), he and other Osler lawyers made inquiries to determine persons involved in the transfer pricing transactions. Approximately 46 individuals employed and formerly employed by the Cameco Group were identified as potentially having relevant information with respect to a potential litigation arising out of income tax assessments. Mr. Macdonald refers to these individuals as "custodians".

[28] The custodians produced hard copy documents to its litigation team, including lawyers and students at Osler. A number of the litigation team attended at Cameco Europe to review the documents and "insure relevant documents were collected for review". An evidence management service provider scanned and coded all the documents. All of the scanned hard copy documents were put into a document review system.

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[4] *Benatta v. Canada (Attorney General)*, 2009 CarswellOnt 7946 (Ontario Superior Court of Justice) at para. 18; see also *Apotex Inc. v. Richter Gedeon Vegyeszeti Gyar RT*, 2010 ONSC 4070, [2010] O.J. No. 2718 (QL), at para 119.

[29] An international accounting firm was engaged to assist in the collection of electronically stored information ("ESI"). The contents of the computers of the custodians still with Cameco were imaged and preserved to the extent they were within the relevant dates. A computerized de-duplication of emails was applied. Then each custodian's user files were processed. In all 68,000 hard drive emails and over 125,000 hard drive user files were processed.

[30] The custodians' email files located on Cameco's server were also copied and those within the relevant date ranges were applied. De-duplication was applied to Cameco's server emails as well. Approximately 500,000 service emails were processed.

[31] The drives on Cameco's servers where custodians indicated they saved potentially relevant documents were copied and irrelevant folders were excluded. Again de-duplication was applied, this time to server user files. Over 350,000 server user files were processed.

[32] Mr. Macdonald detailed the filing structure of the Cameco Group and how those files were identified during the documentation collection process. Approximately 110,000 hard copy documents were collected from the custodians, loaded into the document review system and were reviewed for relevance by lawyers and students at Osler. The documents were allocated to 22 categories such as the corporation's "Corporate Documents", "Services", "Purchases", "Sales", etc.

[33] Mr. Macdonald states the volume of the ESI is "enormous" and search terms were necessary to identify potentially relevant documents. The parties could not readily agree to search terms. The Crown rejected Osler's set of search terms at a meeting on November 1, 2011 and correspondence was exchanged through March 2013 regarding the necessity of using search terms to identify relevant ESI and other matters. That the parties could not agree on search terms did not help the process.

[34] The search terms devised by the appellant, Mr. Macdonald explains, were taken from frequently encountered terms with respect to the various categories. To determine whether they were sufficiently broad and catch documents previously identified in a manual review, the search terms were test run in the hard copy database. Upon review of the results, Cameco was satisfied that its search terms were comprehensive and would best identify potentially relevant ESI.

[35] On invitation of Cameco, the respondent provided comments on the search terms proposed for one category but not for the others. Cameco engaged a third party

to perform, under Osler's supervision, a first level review of the ESI identified as relevant by the search strings. Quality control was performed by Osler.

[36] In all Cameco has produced 59,000 hard copy documents and generally classified the documents into categories and 96,000 electronic documents and "generally indicated" which search term related to each document. Documents were delivered on a "rolling basis" between August 11, 2011 and April 30, 2013.

[37] The enormous volume of ESI and resources spent in this dispute leads me to consider whether the parties — not the Court — is making the best use of time and money in preparing for discovery. The parties are entitled to access to all relevant information but, on the other hand, all litigation should be conducted efficiently in terms of both time and cost[5].

[38] Even before the release of the *Wolf Report*[6] on administration of justice was released in 1996, lawyers, academics and judges have been concerned as to the high cost and abnormal time spent in litigation. Gradually the concept of proportionality entered into rules of practice of most Canadian courts[7]. Lord Justice Jackson wrote that the concept of proportionality requires "dealing with a case in ways which are proportionate to the amount of money involved, the importance of the case and the complexity of the issues"[8].

[39] That is not to say that judges, in exercising their inherent jurisdiction, before 1996, did not consider earlier proportionality in arriving at their decisions.

[40] The codification of the concept of proportionality is not necessarily the cure for discovery problems. There is always the human element present.

[41] The concept of proportionality has become increasingly important as the use of electronic discovery grows. An example of proportionality informing discovery in

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5 See Campbell, Colin L., *Reflections on proportionality and legal culture*, The Advocates Journal, March 2010 pp. 4-7.

6 *Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, (Norwich, U.K: Her Majesty's Stationery Office, 1996.) ("*Wolf Report*"). See also the Interim Report of 1995.

7 See, for example, *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3 Object of Rules, Quebec *Code of Civil Procedure*, art. 4.2, Ontario *Rules of Civil Procedure*, RRO 1990, Reg. 194, Sections 1.04(1), 1.1 and 29.2.03(1).

8 *Review of Civil Litigation Costs: Final Report* (Norwich, U.K.: The Stationery Office, 2010, at para. 3.6.

this Court is in *Canadian Imperial Bank of Commerce v. The Queen.*[9] In deciding whether to grant an order for full disclosure pursuant to Rule 82, Justice Jorré held:

> **109** Both parties have significant resources, there is a good deal of tax at stake and there appears to be significant and serious issues at stake. In the sense proportionality is often discussed, it is probably not an issue here.
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> **110** However, there is a long tradition in tax of trying to keep down, if possible, the amount of time and effort spent on pretrial stages of the proceeding. It is reflected in the choice of Rule 81 as the default rule. Arguably, this tradition is also a kind of consideration of proportionality although, to my knowledge, discussions of proportionality started much more recently than this tradition.

[42] As in *CIBC*, where a great deal of tax is at stake, and the issues are particularly complex, there should be an effort to keep costs down at least during pretrial stages of a proceeding, if not later as well. It may well be that a party is entitled to all documents relevant to a matter in issue in an appeal but we must sometimes ask if although the document is relevant is it material to the issue or of significant value in the court's appreciation of the evidence?

[43] Electronic discovery poses many challenges and a more practical and efficient process is necessary to ensure that the burden of discovery remains proportionate to the issues, interest and money at stake. The *Sedona Canada Principles* have become the *de facto* standard for many rules of civil procedure. With respect to electronic discovery, the *The Sedona Canada Principles Addressing Electronic Discovery* in Principle 2 provides:[10]

> In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

[44] The facts in this appeal are complex. The Affidavit of Peter Macdonald describes the document collection process and it is apparent that the appellant has dedicated significant resources including employing expertise, time and costs. Yet, given the complexity of this case and the amount at stake, it is not unreasonable for

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9 2013 TCC 170; [2013] T.C.J. No. 137 (QL) ("*CIBC*").

10 *The Sedona Canada Principles Addressing Electronic Discovery* (January 2008).

the appellant to review and conduct additional searches and make further inquiries into certain documents.

[45] There are deficiencies in the appellant's production of documents and, having agreed to conduct full disclosure, the appellant must provide all documents that are relevant and material to any matter in issue. The appellant's law firm did review material in its possession but, as Mr. Macdonald stated, counsel did not require the appellant to make a further review of material in its possession, for example.

[46] I am informed by respondent's counsel that on January 21, 2014 the Crown received a DVD from the appellant containing 2,389 documents. At a case management conference on January 30 of this year, appellant's counsel advised that these may be all the outstanding documents being sought by the respondent. I did inform counsel of both parties that I would be ordering a better List of Documents with respect to the 2003 appeal and that the appellant would be required to make additional searches. Since the respondent has had possession of the latest DVD for close to a month her application to delay discovery of the appellant will be extended to 120 days from service of any additional List of Documents. Counsel replied that the appellant would require 30 days to make the searches.

Privileged Documents

[47] The next issue in this motion is whether the appellant improperly claimed privilege over Schedule A documents and Schedule B documents. Solicitor-client privilege is strongly guarded, and in only certain circumstances will exceptions be granted. Rule 82[11] requires as part of full disclosure that any documents for which the party claims privilege must also provide grounds for the claim. When privilege is claimed by a party, the onus is on the party claiming privilege[12].

a) Schedule "A" Documents

[48] The respondent submits that the current Schedule A to the List of Documents does not identify which documents have been redacted, nor provide a basis for privilege. Documents such as an interoffice Cameco memo regarding a "To do List" for an Offshore Structure has been redacted. However, respondent complains,

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11 *Lavallée, Rackel and Heintz v. Canada* (*Attorney General*), 2002 SCC 61; 2002 S.C.R. 209, at para. 35 ("*Lavallée*").

12 *Imperial Tobacco v. R.*, 2013 TCC 144; [2013] T.C.J. No. 86 (QL), ("*Imperial Tobacco"*).

because neither the author nor the recipient is a lawyer, it is difficult to infer that privilege has been properly claimed.

[49] All potentially relevant documents, Mr. Macdonald states, were examined for privilege and, where deemed appropriate, the particular document was redacted to protect privileged information, some documents were redacted in full and produced. Electronically stored documents that were redacted were stamped with the reasons for the redaction. All electronically stored documents were redacted only for solicitor-client privilege. Documents originally in paper form were redacted to protect solicitor-client privilege or, in a "small handful" of redactions, to protect personal information. For example, respondent asserts, a consulting agreement renewal provides a salary amount to be redacted however, another version of the same agreement that was produced does not have the same redaction. No basis was provided for the redactions.

(b) Schedule "B" to Rule 82 – List of Documents

[50] The respondent also claims that the Schedule B to the List of Documents is deficient in that it lacks a List of Documents for which privilege is claimed.

[51] Mr. Macdonald acknowledges that the List of Documents served and filed by the appellant did not contain a detailed Schedule B listing all documents for which Cameco claims privilege. He states that, based on his experience and discussion with colleagues, it is not unusual for parties not to include such a detailed Schedule B. However, subsequently, in view of the Crown's request, a detailed Schedule B consisting of approximately 36,000 documents was served. The detailed Schedule B, according to Mr. Macdonald, also contains explanations supporting the privilege claim.

[52] The respondent does not agree. Her counsel argues that in many instances sufficient information is not provided to establish privilege. There are several documents where no information is given except for the document type, and the author. This includes documents prepared by a non-lawyer and sent to groups of Cameco employees, with no further information for claiming privilege. In some circumstances, the description of documents states: "repeats legal advice provided by counsel".

[53] My colleague Justice D'Arcy in *Imperial Tobacco*[13] affirmed that communications between employees of a company that include legal advice provided by the corporation's lawyer will be considered privileged. However, Justice D'Arcy also emphasized that privilege will not exist for internal communication that does not pass confidential legal advice or involve the seeking of legal advice:

> [57] However, an internal communication that does not constitute the passing on of confidential legal advice or directly involve the seeking of legal advice will not be privileged. Further, such a document does not become privileged merely because a copy is sent to a lawyer. However, if the lawyer marks the document or makes a note on it, then it becomes a working paper of the lawyer and the marked copy is privileged.
>
> [Footnote omitted.]

[54] A task before me is to determine whether internal communication contained legal advice or whether it was non-privileged internal communication. Solicitor-client privilege may exist if it involved communication with counsel. However, where no information is provided about who prepared the documents one cannot even adduce the grounds for privilege. It may very well be that the documents in question are protected due to solicitor-client privilege but it is up to the appellant to provide some basis for their claim. For that reason, I will have to allow the respondent's motion that the appellant provide a further and better affidavit of documents that properly discloses any claim for privilege.

Redactions

[55] Turning briefly to redactions for privacy, the appellant submits that in certain situations, redactions were made for privacy, including salaries. Justice Webb in *Heinig v. Canada*[14] held that in finding a document to contain confidential information that may not be relevant does not necessarily require that the entire document should be disclosed. Webb J., as he then was, agreed that the social insurance number and income of third parties were to be redacted:

> [10] It seems to me that the reference to all documents does not necessarily mean that an entire document should be disclosed to an appellant if only part of that document is relevant to the appeal and another part contains confidential third party information that is not relevant to the appeal. In my opinion it would not be appropriate for the entire document to be disclosed if these parts could be severed. Only the relevant part will be required to be disclosed if the relevant part can be

[13] Supra at para 56.

[14] 2009 TCC 47; [2009] T.C.J. No. 36 (QL), ("*Heinig*").

> severed from the irrelevant part without rendering the relevant part incomprehensible. If the irrelevant part that contains confidential third party information cannot be severed from the relevant part without rendering the relevant part incomprehensible, then the entire document would have to be disclosed.
>
> [Emphasis Added]

[56] With respect to improperly claiming privilege over documents in its Schedule A and Schedule B documents, the appellant did not properly provide a basis for the documents where privilege is claimed. The appellant shall review redactions to ensure privilege has been properly claimed and provide a basis for documents where privilege has been claimed. Redactions for privacy, such as the salary are appropriate so long as it does not render the relevant parts incomprehensible.

Description of Documents

[57] Lastly, the respondent took issue with the description of documents provided by the appellant pursuant to Rule 84 of the *TCC Rules*:

A list of documents made in compliance with section 81 or 82 shall enumerate the documents in a convenient order as briefly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle shall be described sufficiently to enable it to be identified.	Une liste de documents établie en vertu de l'article 81 ou 82 doit suivre la forme appropriée et énumérer les documents dans un ordre commode et aussi succinctement que possible tout en donnant la désignation de chacun d'eux ou, dans le cas de liasses de documents de même nature, la désignation de chaque liasse, de façon suffisante pour en permettre l'identification.

[58] Currently, the descriptions of documents are based on the metadata of the documents. These documents each have a unique numerical identification. There are elements such as the author and date in the description that do not correspond directly to the author and date on the face of the document.

[59] The respondent argues that the use of metadata to describe the document is unsatisfactory, that there should be sufficient information to describe each document. In oral submissions, the respondent argued that the appellant's use of metadata has resulted in a "maldescription" of the documents.

[60] With respect to the respondent's claim that certain documents produced by Cameco showing the author and date on the List of Documents do not always correspond with the author and date on the face of the documents, Mr. Macdonald said that the respondent was informed that Cameco would be using the metadata associated with each ESI document to produce its List of Documents. His understanding of metadata is that it describes certain properties of electronically stored documents that are automatically assigned to the document through the computer operating system and the application used to create the documents. Metadata can indicate properties such as the date a document was created or modified on a computer. In providing copies of relevant ESI, Cameco also provided metadata such as author, date of document for each available document to the extent available. This metadata was provided on Schedule A of the List of Documents. However, in some cases, the author or date indicated on the face of a document varies from the metadata about that document.

[61] At least one appeal in this Court with a high volume of documents has proceeded utilizing a unique numerical identifier for the description of the document[15]. Justice Lane in *Solid Waste*[16] held that in cases where large volumes of documents were involved, a more practical system calls for documents to be described using an alpha-numeric or numeric identifier:

> 9 The sheer quantity of documents in many modern litigations demands a precise identification system for swift and certain retrieval of documents in examinations for discovery and trial. Such a system should also enable counsel to be certain that a document produced at trial has indeed been previously produced. It must enable counsel examining a collection of the opposite party's documents to be satisfied that he has the whole collection as described in Schedule A. A modern rule as to identifying documents cannot ignore the computer and its need for a unique identifier for every item to be retrieved. Unless very extensive details about each document are entered in Schedule A, an alpha-numeric or numeric identifier is necessary. The preparation of a Schedule A containing a detailed description of every document would be a truly monumental task in many lawsuits. It is not practical.
>
> 10 The logic of these practical requirements drives one inexorably to the proposition that proper identification demands numbering each document with a unique number. Such a number is far more valuable than a long-winded description of each document, including its sender, addressee, date, etc., and the creation of a numeric system is far less costly when thousands of documents are involved.

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15 *GlaxoSmithKline*, 2008 TCC 324; [2008] T.C.J. No. 249 (QL).

16 *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.*, [1991] O.J. No. 213 (QL); 2 O.R. (3d) 481 (Ont. Gen. Div.) ("*Solid Waste*").

[62] In oral submissions before me, the respondent's counsel commented that it would actually be more helpful to only have the document identifier number and no author and no date. I agree. So long as the appellant has provided sufficient description of the documents using a numerical identifier for each document, its identification of the document is satisfactory.

[63] An order will be issued as follows:

1. The Motions with respect to the appellant's appeals for 2004 (Court file No. 2010-3477(IT)G), 2005 (Court file Nos. 2011-1909(IT)G and 2013-3018(IT)G) and 2006 (Court file Nos. 2012-3256(IT)G and 2013-3019(IT)G) are quashed, except for the motion to consolidate the appellant's appeals for 2003, 2005 and 2006 which the respondent has withdrawn;

2. The appellant shall serve a further and better affidavit and List of Documents in accordance with Rule 82 of the *TCC Rules* in Court File No. 2009-2430(IT)G with respect to its appeal from an assessment for its 2003 taxation year, and in particular:

   i) the List of Documents shall contain all relevant and material documents in the appellant's possession, control or power that are not included on the List of Documents previously filed and served on the respondent;

   ii) the appellant shall identify the legal basis of redactions in documents included in Schedule "A" to the List previously filed and served; and

   iii) the appellant shall describe all relevant and material documents over which solicitor-client privilege is claimed in Schedule "B" to the List of Documents previously filed.

3. The appellant shall serve a further and better affidavit of documents on the respondent not later than 30 days of this Order or such other date as the parties may agree and the Court approve upon written notice;

4. The respondent shall conduct its discovery of the appellant commencing not later than 120 days after service of the further and better affidavit of

documents or upon other time as the parties may agree and the Court approve upon written notice; and

5. Costs shall be in the cause.

Signed at Ottawa, Canada, this 13th day of February 2014.

"Gerald J. Rip"

Rip C.J.

CITATION:	2014 TCC 45
COURT FILE NOS.	2010-3477(IT)G, 2011-1909(IT)G, 2012-3256(IT)G, 2009-2430(IT)G, 2013-3018(IT)G and 2013-3019(IT)G
STYLE OF CAUSE:	CAMECO CORPORATION v HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	June 12, 2013 and September 26, 2013
REASONS FOR ORDER BY:	The Honourable Gerald J. Rip, Chief Justice
DATE OF ORDER:	February 13, 2014

APPEARANCES:

Counsel for the Appellant:	Joseph M. Steiner Pooja Samtani
Counsel for the Respondent:	Naomi Goldstein Elizabeth Chasson Diana N. Aird

COUNSEL OF RECORD:

For the Appellant:

Name:	Joseph M. Steiner
Firm:	Osler, Hoskin & Harcourt LLP Toronto, Ontario

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