2010 TAX LAW FOR LAWYERS
National Tax Law CLE Program

TAX DISPUTE RESOLUTION II: THE CONDUCT OF TAX LITIGATION

-and-

MATERIALS FOR *PRACTICE DILEMMAS*

by

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FOREWORD

This paper is largely extracted from chapter 4 of *Tax Court Practice©* with the permission of Carswell.[1] *Tax Court Practice©* is updated at least twice yearly and should be consulted for changes to the Court's Rules, governing legislation, and additional case annotations. This paper contains the *General Procedure Rules* of the Tax Court and selected annotations concerning pleadings, lists of documents and examinations for discovery. Portions of the paper are also relevant to points covered in the panel discussion: *Practice Dilemmas* – see, especially, the annotations concerning litigation and solicitor-client privilege, under Rule 82 of the *General Procedure Rules*.

Proposed amendments to the *Tax Court of Canada Rules (General Procedure)* were announced by the Court as effective January 18, 2010 by Practice Note No. 17. In an attempt to codify the practice which is now ongoing in the Tax Court of Canada and to streamline the process of hearings in litigation, the Court proposes to amend the Rules to provide for Litigation Process Conferences and costs consequences for early settlement offers. From January 18, 2010, practice in the Court will be governed by the proposed amendments until they receive approval of the Governor in Council.

First, the Status Hearing provided for in s. 125 of the *Rules* has been revamped. An initial Status Hearing can now be called approximately two months after the close of pleadings and could lead to a litigation schedule and further Status Hearings. Further Status Hearings may be continued or initiated later in the appeal by the Court or at the request of a party to move an appeal along that has not been case managed, or in any event, for the purpose of having the appeal set down for hearing. These further Status Hearings can take place before or after a joint application for hearing is filed. The Court may canvass whether settlement has been discussed, if the issues are/have been properly defined, whether the appropriate pre-trial steps in the appeal have been completed, what the approximate length of hearing will be and the appropriateness/desire to fix a date for hearing. An initial Status Hearing is likely if a case management judge has not been appointed or no litigation schedule Order has been issued.

New s. 126.1 of the *Rules* is the Tax Court's new Case Management rule. Case Management is designed to permit the Chief Justice to assign a judge to manage an appeal or group of appeals. The judge takes responsibility for progress of the appeal and all matters arising prior to the hearing.

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[1] Two volume looseleaf service co-authored with Gordon Bourgard beginning in 1990.

New s. 126.2 of the *Rules* provides for Trial Management Conferences. This conference will take place after the appeal hearing date has been fixed and is a conference which is presided over by the assigned trial judge dealing with procedure at trial.

New s. 126.3 sets up a separate Settlement Conference which may take place on the Court's own initiative or at the request of either party at any time in the litigation of the appeal and includes requirements for the service of a settlement conference brief.

Section 147(3.1) is added to the rules to provide a specific costs rule to encourage early settlements before the beginning of the trial.

Consequential amendments are made to s. 127 and 128 of the *Rules* which deal with memoranda, directions and requirements of non-disclosure following a litigation process conference.

In new s. 146.1 the Court has created a Lead Case rule, intended to apply where there is more than one appeal which has common or related issues of fact or law. It allows the Court to specify one or more of the appeals as a lead case and proceed with a hearing while others are stayed pending a decision on the appeals heard by the Court. A Lead Case decision will now be communicated to appellants whose appeals are stayed and those appellants will now have to notify the Court as to whether they agree to be bound by the decision in whole or in part.

Finally, s. 6 of the *Rules* is amended to provide for videoconferences and to apply to the new Litigation Process Conferences.

March 5, 2010
Ottawa, Ontario

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***Each rule of the General Procedure is followed by a concordance to the following rules of practice and procedure:**

F.C.	Federal Court Rules	SOR/98-106
O.R.	Ontario Rules of Civil Procedure	O. Reg. 560/84 as amended
Man.	Manitoba Queen's Bench Rules	R.M. 553/88

P.E.I.	Prince Edward Island Rules of Civil Procedure	
N.B.	New Brunswick Rules of Court	O.C. 82.340 as amended
N.S.	Nova Scotia Civil Procedure Rules	
Nfld.	Newfoundland Rules of the Supreme Court, 1986	Nfld. Reg. 197/87
Sask.	Saskatchewan Queen's Bench Rules	
Alta.	Alberta Rules of Court Alta. Reg. 338/83 as amended	
B.C.	British Columbia Rules of Court	B.C. Reg. 421/75 as amended

In the concordance the various rules have been categorized in comparative fashion in the following manner:

Same as: either exactly the same or with minor differences such as the time within which something may be done

Very similar to: close to being the same but with some modifications or changes in language

Similar to: the wording may be the same in part and the object and spirit is similar

Different than: the practice and procedure is different

*** Not included in this paper.**

TAX COURT OF CANADA RULES (GENERAL PROCEDURE)

SOR/90-688, as amended by SOR/92-41; SOR/93-96; SOR/95-113;
SOR/96-144; SOR/99-209

SECTIONS 43-53 PLEADINGS

Pleadings Required or Permitted

43. (1) In an appeal, the pleadings shall consist of the notice of appeal, the reply to the notice of appeal called "the reply" and the answer to the reply to the notice of appeal, if any, called "the answer".

(2) In an appeal commenced by a notice of objection pursuant to paragraph 165(3)(b) of the *Income Tax Act* the notice shall constitute the notice of appeal.

Note: Paragraph 165(3)(b) of the *Income Tax Act* was repealed by S.C. 1993, c. 24, subsec. 98(3).

(3) No pleading subsequent to an answer shall be filed without the consent in writing of the opposite party or leave of the Court.

Function of Pleadings

Powell v. The Queen, [2001] 1 C.T.C. 2813, 2001 D.T.C. 209 (T.C.C.)-Counsel must properly prepare and review pleadings to ensure that the issues are well-defined. The court should not have to sort through inadequate pleadings in order to help the parties define the issues.

Time for Delivery of Reply to Notice of Appeal

44. (1) A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless

(a) the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or

(b) the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.

(2) If a reply is not filed within an applicable period specified under subsection (1), the allegations of fact contained in the notice of appeal are presumed to be true for purposes of the appeal.

(3) A reply shall be served

(a) within five days after the 60-day period prescribed under subsection (1),

(b) within the time specified in a consent given by the appellant under subsection (1); or

(c) within the time specified in an extension of time granted by the Court under subsection (1).

(4) Subsection 12(3) has no application to this section and the presumption in subsection (2) is a rebuttable presumption. [SOR/92-41 (P.C. 1991-2510, dated December 12, 1991); SOR/99-209, s. 4.]

Note: The General Procedure Rules do not contemplate the late filing of a Reply to the Notice of Appeal even where the appellant has not noted the respondent in default. The Court's present practice is to refuse to accept a Reply to the Notice of Appeal for filing after the 60th day without the appellant's consent in writing attached or an order having been obtained.

Compare this procedure to that under the Informal Procedure where, under subsection 18.16(4) the Minister may file a Reply to the Notice of Appeal after the 60-day limit without consent or an order but with the consequence that the allegations of fact in the Notice of Appeal are presumed to be true.

Under section 63 of the General Procedure Rules, the appellant may apply on motion for judgment in respect of the relief sought in the Notice of Appeal when a Reply to the Notice of Appeal has not been filed and served within the time prescribed in section 44.

Telus Communications (Edmonton) Inc. v. The Queen, 2003 TCC 853 (T.C.C.) – The test laid down by the Federal Court of Appeal in *Canada v. Hennelly* (1999) 244 N.R. 399 is the proper test to be applied in deciding whether to permit the late filing of a reply. An order extending time should be granted where the applicant shows that a reasonable explanation for the delay exists; that no prejudice to the other party arises from the delay; that the applicant's case has merit; and that the applicant had a continuing intention to file the document. Here the error was at the clerical level before the file was assigned to counsel and there was no evidence of any continuous or repeated breakdown of the internal system to ensure the timely filing of replies. Prejudice resulting from additional legal fees could be compensated in costs. If the loss of the rebuttable presumption that the facts in the notice of appeal are presumed to be true was by itself sufficient prejudice, there would be no power to ever grant an extension of time.

Time for Delivery of Answer

45. An answer, if any, shall be filed and served within thirty days after service of the Reply to the Notice of Appeal. (Form 45)

Note: As the appellant is by subsection 50(2) of the Rules deemed to deny all allegations of fact made in the Reply to the Notice of Appeal if an answer is not delivered, it would not seem necessary to file an answer that is a simple joinder of issue.

This Rule, unlike Rule 44, does not exclude the operation of subsection 12(3) of the Rules, which provides that the time for filing, serving or delivering a document may be extended or abridged by consent in writing.

Close of Pleadings

46. Pleadings are closed when an appellant has filed and served an answer to the Reply to the Notice of Appeal or the time for the filing and serving of an answer has expired.

Note: As the time for filing and serving an answer can be extended by consent in writing, in accordance with subsection 12(3) of the Rules, the time when pleadings are closed can also be extended.

Form of Pleadings

47. (1) Pleadings shall be divided into paragraphs, numbered consecutively, and each allegation shall, so far as is practical, be contained in a separate paragraph.

(2) Where it is convenient to do so, particulars may be set out in a separate document attached as a schedule to the pleading.

Rules of Pleadings—Applicable to Notice of Appeal

48. Every notice of appeal shall be in Form 21(1)(a). (See page 79 of this paper for this Form)

Note: The requirement of a statement of material facts which appears in the rules of other jurisdictions is found on Form 21(1)(a) itself. Also note that s. 19.2 of the *Tax Court of Canada Act* requires that notice be given to the Federal Attorney General and the Provincial Attorneys General where a constitutional question is to be raised. Cases dealing with limits on matters which may be argued when not specifically pleaded are found under para. 49(1)(g) of the General Procedure Rules in chapter 4 of *Tax Court Practice©*.

Contents of Notice of Appeal

McGoldrick v. The Queen, [2004] 3 C.T.C. 264 (F.C.A.) – The appellant was unable to address the quantum of a benefit assessed, as he did not raise the issue in the notice of appeal filed in the Tax Court of Canada.

TransCanada Pipelines Ltd. v. The Queen, [2001] 1 C.T.C. 43, 2001 D.T.C. 5625 (F.C.A.), leave to appeal refused (June 20, 2002), Doc. 28970 (S.C.C.)-Failure to include in the notice of appeal all the issues on which the taxpayer intended to rely was fatal to those issues after the appeal was settled and disposed of on a subsec. 169(3) consent. Subsecs. 169(3) and 165(1.2) are not issue-specific. They speak of disposing of an appeal, not issues on an appeal. A taxpayer is not entitled to file an objection, then file a notice of appeal in respect of those issues that it chooses to appeal and to file a subsequent appeal if it chooses to appeal other issues.

Tremblay v. The Queen, [2003] 4 C.T.C. 2823 (T.C.C.) – The appellant was not permitted to make an alternative argument that he incurred business investment losses that was not raised in the notice of appeal.

Cross-reference: See the cases annotated under *Federal Court Act*, s. 52 - raising matters not argued at trial, in chapter 15 of *Tax Court Practice©*.

Rules of Pleadings—Applicable to Reply

49. (1) Subject to subsection (1.1) every reply shall state

(a) the facts that are admitted,

(b) the facts that are denied,

(c) the facts of which the respondent has no knowledge and puts in issue,

(d) the findings or assumptions of fact made by the Minister when making the assessment,

(e) any other material fact,

(f) the issues to be decided,
(g) the statutory provisions relied on,

(h) the reasons the respondent intends to rely on, and

(i) the relief sought. [SOR/96-144, s. 2(1)]

(1.1) A reply to a notice of appeal referred to in paragraph 21(1)(d) shall state,

(a) the facts that are admitted,

(b) the facts that are denied,

(c) the facts of which the respondent has no knowledge and puts in issue,

(d) any other material fact,

(e) the issues to be decided,

(f) the reasons which the respondent intends to rely on, and

(g) the relief sought. [SOR/96-144, s. 2(2)]

(2) All allegations of fact contained in a notice of appeal that are not denied in the reply shall be deemed to be admitted unless it is pleaded that the respondent has no knowledge of the fact.

Findings or Assumptions of Fact-Paragraph 49(1)(d)

The Queen v. Loewen, [2004] 3 C.T.C. 6 (F.C.A.) - The basis of an assessment is a matter of historical fact, and does not change. The basis of the reassessment includes the facts relating to the increased taxable income, as the Minister perceived those facts when the reassessment was made. It also includes the manner in which the Minister applied to facts to the relevant law in making the reassessment, and any conclusions of law that guided the application of the facts to the law. The Minister's factual assumptions, as stated in the pleadings, are taken as fact unless they are disproved or it is established that the Minister did not make the assumptions which are said to have been made. The taxpayer has the onus of proving that the Minister's assumptions are wrong, or that they were not made. It is also open to the taxpayer to attempt to establish by argument that, even if the assumed facts are true, they do not justify the assessment as a matter of law. It is the obligation of the Crown to ensure that the assumptions pleaded are clear and accurate. For example, the pleaded assumptions cannot state that the Minister assumed two things which cannot possibly exist at the same time. It is not open to the Crown to plead that an assumption was made when making a reassessment if it was not made until confirming the reassessment; however, it is open to the Crown to plead that the assumption was made in confirming the reassessment. In pleading the assumptions, there may be occasions where it is appropriate for the Crown to use the words "so-called", "called a", "alleged" and "purported".

Anchor Pointe Enegery Ltd. v. The Queen, [2004] 5 C.T.C. 96 (F.C.A.) – The facts pleaded as assumptions must be precise and accurate so that the taxpayer knows exactly the case to be met. The Crown must state whether the assumptions arose on an assessment, reassessment or confirmation. Legal statements or conclusions of law have no place in the Minister's assumptions. If the issue is one of mixed fact and law, the factual component should be extricated and set out.

Roseland Farms Ltd. v. M.N.R., [2001] 3 C.T.C. 124, 2001 D.T.C. 5392 (F.C.A.), leave to appeal refused 2001 CarswellNat 2222 (S.C.C.)-The Minister's assumptions are made because it is the taxpayer who best knows his own affairs. Once an assumption is stated, it is for the taxpayer to prove it wrong through his superior access to information about his personal affairs. The examination for discovery may help define and narrow the issues for trial, but it cannot be viewed as a preliminary challenge to the reasonableness of the Minister's assumptions which, if successful, will preclude the burden of proof from shifting.

Allegations of Misrepresentation or Fraud

Hans v. The Queen, 2003 D.T.C. 1065 (T.C.C.) – The Minister must plead the specific facts of misrepresentation that justify reopening the year and imposing a penalty that he alleges and intends to prove at trial. The Minister cannot merely recite the provisions of the Act the Minister says were not complied with because that is pleading conclusions of law. In attempting to justify reassessing statute-barred years the Minister is confined to those misrepresentations known and relied on to justify making the reassessments at the time they were made. The Minister cannot reassess and then later fish for reasons.

Alternative Assumptions

CIT Financial Ltd. v. The Queen, [2004] 1 C.T.C. 2232 (T.C.C.), appeal dismissed [2004] 4 C.T.C. 9 (F.C.A.) – The Court stated that it found it odd that the Minister assumed facts which would completely destroy a claim for capital cost allowance and then also assumed that GAAR applied, as the GAAR assumption was logically inconsistent with the other assumptions pleaded and they could not stand together.

S.T.B. Holdings Ltd. v. The Queen (2001), [2002] 1 C.T.C. 2814, 2002 D.T.C. 1254 (T.C.C.)-GAAR may be an alternative assessing position.

Assumptions Based on Hearsay

Chomica v. The Queen, [2003] T.C.J. No. 57 (T.C.C.) – The Minister may base an assessment on hearsay, but if called on to justify the assessment by calling evidence, the evidence must be admissible.

Other Material Facts - Paragraph 49(1)(e)

The Queen v. Loewen, 2004 FCA 146 - The constraints upon the Crown which apply to pleading assumptions do not apply to preclude it from asserting, elsewhere in the reply, factual allegations and legal arguments inconsistent with the basis of assessment. The Crown has the burden of proving such other allegations of fact.

Cross-reference: GP Rules, s. 2-“*assessment*”; *ITA*, s. 169 Nature of an Appeal from an Assessment, chapter 16 of *Tax Court Practice©*.

Issues to be Decided—Paragraph 49(1)(f)

Canada v. Mohawk Oil Co., [1992] 1 C.T.C. 195 (F.C.A.) – An alternative argument by the appellant was not dealt with on its merits as the omission of the issue from the statement of defence foreclosed the appellant from raising it on appeal.

Jacques St-Onge Inc. v. The Queen, [2004] 1 C.T.C. 2094 (T.C.C.) – Although it appeared to the Court that the appellant had claimed a deduction for an ABIL on shares that, in whole or in part, had not been issued, and the Court was not certain that the appellant had met the condition in clause 50(1)(b)(iii)(a) of the *Income Tax Act* that its wholly-owned subsidiary was an insolvent corporation at the end of the year, the matters were not raised by the respondent in the reply or at the hearing. The Court therefore held that the appellant was only obliged to demolish the facts relied upon in making the assessment in order to succeed in its appeals.

Cross-reference: See cases annotated under Rule 135 – *Argument - Raising Matters not Pleaded*, in chap. 3 of *Tax Court Practice©*.

Statutory Provisions Relied On-Paragraph 49(1)(g)

The Queen v. Loewen, [2004] 3 C.T.C. 6 (F.C.A.) – The Crown may be permitted to defend an assessment by relying on a legal argument that was not part of the basis of assessment. Generally, such new arguments are permitted if they arise from the evidence in the Tax Court. The scope of the evidence in the Tax Court is itself limited by the pleadings. The result is that new legal arguments are permissible to the extent that they are consequential on the facts alleged in the pleadings, including the notice of appeal, the assumptions in the reply and any additional facts alleged in the reply. The right of the Crown to rely upon an alternative argument is now governed by subsec. 152(9) of the Income Tax Act. The expiration of the normal reassessment period does not preclude the Crown from defending an assessment on any ground, subject only to paras. 152(9)(a) and (b), which speak to the prejudice to the taxpayer which may arise if the Crown is permitted to make new factual allegations.

Reasons the Respondent Intends to Rely On-Paragraph 49(1)(h)

Blanchette v. The Queen, [2003] 4 C.T.C. 2708 (T.C.C.) – Even before subsec. 152(9) was added to the Income Tax Act, the law was that on an appeal the Crown could rely on reasons other than those considered at the time of the assessment. Neither the caselaw nor subsec. 152(9) require that the determination resulting from the alternative argument must correspond exactly to the amount of the assessment under appeal. The Minister is entitled to raise arguments which establish that the assessed amount is not too high. The relief that the Minister seeks is that the appeal from the assessments be dismissed, not that the assessment be referred back for reconsideration and reassessment if the appeal is dismissed. On assessing the Minister had assumed that partnerships existed and that the appellants were sleeping partners. On appeal the Court permitted the Crown to advance the alternative arguments that the partnership did not exist or that the partners were limited partners. The arguments were not fundamentally different than the issue on assessment. What the Minister cannot do is advance an argument that is utterly unrelated to the element of the assessment under appeal.

Pleading Jurisdiction

Cross-reference: Cannot Acquire Jurisdiction by Consent, s. 12 T.C.C.A., chapter 3 of *Tax Court Practice©*.

Rules of Pleadings–Applicable to Answer

50. (1) Every answer shall state,

(a) the new facts raised in the reply that are admitted,

(b) the new facts raised in the reply that are denied,

(c) the new facts raised in the reply of which the appellant has no knowledge and puts in issue,

(d) any facts material to the facts pleaded in the reply which have not already been pleaded in the notice of appeal,

(e) any further statutory provisions relied on, and

(f) any other reasons the appellant intends to rely on.

(2) An appellant shall be deemed to deny the allegations of fact made in the reply if an answer is not delivered.

Rules of Pleadings—Applicable to all Pleadings

51. (1) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

(2) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.

(3) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. [SOR/93-96, s. 9.]

Demand for Particulars

52. Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within thirty days, the court may order particulars to be delivered within a specified time.

Note: The Rule does not specify that particulars are to be served and filed. However, the Rule is the same as O.R. 25.10 and P.E.I. 25.10 and in those Rules "*deliver*" is defined in O.R. 1.03(8) and P.E.I. 1.03(1)(k) as meaning serving and filing with proof of service.

Given the time limits imposed by Rule 44 for filing and serving a Reply to the Notice of Appeal or applying for an extension of time, a demand by the respondent for particulars for the purpose of pleading should be accompanied by an application to extend time.

Particulars of an Allegation in a Pleading

Gardner v. The Queen, [2001] 4 C.T.C. 2868, 2001 D.T.C. 915 (T.C.C.), affirmed [2002] 3 C.T.C. 322 (F.C.A.)-Particulars require a party to clarify the issues in the pleadings and an examination for discovery is no substitute. Particulars operate as a pleading. Particulars (1) inform the other side of the nature of the case they have to meet as distinguished from the mode in which the case is to be proved; (2) prevent surprise; (3) enable the other side to know what evidence ought to be prepared; (4) limit the generality of the pleadings; (5) limit and decide the issues to be tried and on which discovery is required; and (6) tie the hands of the party so that without leave the party cannot go into matters not included. The court ordered particulars of an alleged misrepresentation to (1) enable the appellant to decide whether to deliver an answer; (2) define the issues for discovery in a way that would permit the appellant to know the case to be met; and (3) to prevent the respondent from using vague allegations to justify a fishing expedition.

Striking out a Pleading or other Document

53. The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair hearing of the action,

(b) is scandalous, frivolous or vexatious, or

(c) is an abuse of the process of the Court.

Note: Motions to strike out a pleading because it discloses no reasonable grounds for appeal or opposing the appeal are brought under para. 58(1)(b) of the Rules.

Shilling v. The Queen, 2004 FCA 416 – Seeking to raise a new issue without notice, or to make an argument that has previously been withdrawn, can be seen as an abuse of process and not permitted.

Niagara Helicopters Ltd. v. The Queen, [2003] 2 C.T.C. 2823 (T.C.C.) – It is inappropriate on a preliminary motion for a judge, who has heard no evidence, to decide that an allegation is irrelevant, thereby depriving a party of the opportunity of putting the matter before the trial judge. The remedy of striking out portions of pleadings on the grounds that they are scandalous, frivolous, vexatious or an abuse of the Court's process should be reserved for the most obvious cases.

Pleading Treatment of Other Taxpayers

Such pleadings may be struck, with some exceptions. See the annotations in chapter 17 of *Tax Court Practice*© under the heading "*Other Taxpayers*".

SECTIONS 54 - 57 AMENDMENTS

When Amendments to Pleadings May be Made

54. A pleading may be amended by the party filing it, at any time before the close of pleadings, and thereafter either on filing the consent of all other parties, or with leave of the Court, and the Court in granting leave may impose such terms as are just.

The Queen v. Potash Corporation of Saskatchewan Inc., [2004] 2 C.T.C. 91 (F.C.A.) – If a large corporation has not reasonably described an issue in its notice of objection then it will not be able to amend its pleadings to include the issue. A general description in an objection regarding the computation of the resource allowance or resource profits without specifying the particular elements of the computation would not support a later amendment to pleadings. It is arguable that an amendment to the appeal could be permitted if the amendment went only to quantum and did not entail the raising of a new issue.

Bondfield Construction Co. (1983) Ltd. v. The Queen, [2004] G.S.T.C. 18 (T.C.C.) – An application to amend the reply close to the end of the hearing when most of the evidence had been received was made too late.

Gehres v. The Queen, [2003] 4 C.T.C. 2752 (T.C.C.) – As the appellant was not given fair notice by the reply to notice of appeal of the issues, both factual and legal, that were involved in a proposed alternative argument, the Court declined to permit the amendment requested. If the respondent had brought a motion to amend prior to trial, an order permitting the amendment may have been granted; however, it was too late to raise the matter for the first time during final argument.

Cross-reference – Subsec. 152(9) ITA – *Alternative Arguments* – chap. 16 of *Tax Court Practice©*.

How Amendments Made

55. (1) An amendment to a pleading shall be made by filing a fresh copy of the original pleading as amended, bearing the date of the amendment and of the original pleading, and the title of the pleading, preceded by the word "amended."

(2) An amendment to a pleading shall be underlined so as to distinguish the amended wording from the original.

Service of Amended Pleading

56. An amended pleading shall be served forthwith upon every person who is, at the time of service, a party to the proceeding unless the court orders otherwise.

Note: Under Rule 23(1), a notice of appeal that has been filed by a taxpayer must be served by the Registrar by transmitting copies thereof to the office of the Deputy Attorney General of Canada. This rule is in conformity with subsec. 17.2(3) of the *Tax Court of Canada Act*. An amended pleading, however, must be served by the party filing it on the other party to the proceedings unless the Court otherwise orders under Rule 56. In the absence of a special direction of the kind contained in subsec. 17.2(3) of the *Income Tax Act* and Rule 23(1), the rule applied is that the party filing a document is required to serve it on the other party. The Tax Court Rule does not include the requirement that proof of service of an amended pleading be filed as in other jurisdictions. The Court's practice is to send a letter acknowledging receipt and filing of an amended pleading with a copy to the other party.

Responding to Amended Pleading

57. (1) A party may respond to an amended pleading within the time remaining for responding to the original pleading, or within ten days after service of the amended pleading, whichever is the

longer period, or, may within such time file an amended pleading in response.

(2) Where a party has responded to a pleading that is subsequently amended, the party shall be deemed to rely on his or her original pleading in answer to the amended pleading, unless the party responds to it within the prescribed time.

SECTIONS 78-91 DISCOVERY OF DOCUMENTS

Interpretation

78. (1) In sections 78 to 91, "document" includes a sound recording, video tape, film, photograph, chart, graph, map, plan, survey, book of account and information recorded or stored by means of any device.

(2) A document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled.

(3) In section 83,

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation, and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,
(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons.

Agreement to Limit Discovery

79. Nothing in sections 78 to 91 shall be taken as preventing parties to an appeal from agreeing to dispense with or limit the discovery of documents that they would otherwise be required to make to each other.

Document in Pleading or Affidavit

80. (1) At any time a party may deliver a notice to any other party, in whose pleadings or affidavit reference is made to a document requiring that other party to produce that document.

(2) The party receiving the notice shall deliver, within ten days, a notice stating a place where the document may be inspected and copied during normal business hours or stating that the party objects to produce the document and the grounds of the objection. (Form 80)

See also: *Grounds of Objection to Production* annotated under Rule 82(2)(b) in this paper.

List of Documents (Partial Disclosure)

81. (1) A party shall, within thirty days following the closing of the pleadings, file and serve on every other party a list of the documents of which the party has knowledge at that time that might be used in evidence,

(a) to establish or to assist in establishing any allegation of fact in any pleading filed by that party, or

(b) to rebut or to assist in rebutting any allegation of fact in any pleading filed by any other party.

(2) A list of documents to be filed under this section shall be in Form 81.

(3) A party who has failed to file and serve a list of documents within the time fixed by subsection (1) may, without leave, file and serve it after that time unless,

(a) a notice of motion for a judgment under section 91 has been filed, or

(b) an application to fix the time and place of hearing under subsection 123(1) has been filed or a date for hearing the appeal has been fixed by the Court, [SOR/96-503, s. 1]

in which case, the party may apply for leave to file and serve the list.

(4) A party who has failed to file and serve a list of documents within the period set by a judge pursuant to subparagraph 125(5)(a)(i) may file and serve it only with leave of the Court. [SOR/95-113, s. 4.]

Note: While Rule 81 provides for only a partial disclosure of documents, full disclosure can be obtained under Rule 82 by agreement or on order or by serving a notice to attend an examination for discovery requiring production of all documents and things relating to any matter in issue in the proceeding that are in that person's possession, control, or power and that are not privileged, pursuant to para.105(3)(a) of the Rules.

List of Documents (Full Disclosure)

82. (1) The parties may agree or, in the absence of agreement, either party may apply to the Court for a judgment directing that each party shall file and serve on each other party a list of all the documents which are or have been in that party's possession, control or power relevant to any matter in question between or among them in the appeal. [SOR/93-96, s. 12; SOR/2008-303, s. 11.]

(2) Where a list of documents is produced in compliance with this section, the list shall describe, in separate schedules, all documents relating to any matter in issue in the appeal,

(a) that are in the party's possession, control or power and that the party does not object to producing,

(b) that are or were in the party's possession, control or power and for which the party

claims privilege, and the grounds for the claim, and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of, or power over them and their present location.

(3) A list of documents filed and served under this section shall be in Form 82(3).

(4) A list of documents made in compliance with this section shall be verified by affidavit (Forms 82(4)A and 82(4)B),

(a) if the party is an individual, by the party unless that person is under disability in which case the affidavit shall be made by that person's tutor, curator, litigation guardian or committee,

(b) if the party is a corporation or any body or group of persons empowered by law to sue or to be sued, either in its own name or in the name of any officer or other person, by any member or officer of such corporation, body or group, and

(c) if the party is the Crown, by any departmental or other officer of the Crown nominated by the Deputy Attorney General of Canada.

(5) The affidavit shall contain a statement that the party has never had possession, control or power of any document relating to any matter in issue in the proceeding other than those included in the list.

(6) The Court may direct a party to attend and be cross-examined on an affidavit delivered under this section.

Note: The requirement to apply to the Court for a judgment directing full disclosure of documents was modelled on former Rule 448(1) of the Federal Court Rules, which was revoked by SOR/90-846 on December 7, 1990. Unlike Rule 81 which provides that a list of documents shall be filed and served within 30 days of the close of pleadings, no time is set in Rule 82 as it will be by agreement or order.

Documents Relevant to Any Matter in Question

Relevance

SmithKline Beecham Animal Health Inc. v. The Queen, [2001] 2 C.T.C. 2086, 2001 D.T.C. 192 (T.C.C.), appeal dismissed 2002 FCA 229 (F.C.A.) - The scope of production of documents and examination for discovery under Rules 82 and 95 is very broad. The rules are intended to reflect the modern principle, discussed in *R. v. Stinchcombe*, that justice is better served when surprise is eliminated and the parties are prepared to address the issues on the basis of complete information. But a party is not required to segregate the documents that have been produced and to identify for the benefit of the opposite party those documents which relate to a particular issue. That is seeking the work product of counsel and goes beyond the ambit of

Rule 82. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use that may legitimately be made of the documents produced.

*Silicate Holdings Ltd. v. The Qu*een, [2001] 2 C.T.C. 2222, 2001 D.T.C. 299 (T.C.C.) - The dealings of the Minister with unrelated third parties or proposals to amend legislation before confirmation of the assessments are not relevant. Doubts expressed by officials as to the success of the litigation do not affect the question as to whether an assessment should be made. What is relevant are the facts the Minister considered in assessing and not the Minister's mental processes or the reasons why the assessment occurred.
Secondary source: Chitty, Sir T.W., *An Affidavit of Documents*, [1924] 2 D.L.R. 1.

Documents for which Privilege Claimed – Rule 82(2)(b)

Morel v. Insurance Corp. of British Columbia (1996), 2 C.P.C. (4th) 95 (B.C.S.C.) - In British Columbia the failure to include relevant documents in a list of documents without adequate explanation or reason, or an unwarranted delay in delivering a list of documents is grounds for ordering an affidavit verifying the list. It is no explanation to say a document is not listed because it may be privileged.

SmithKline Beecham Animal Health Inc. v. The Queen, T.C.C., 95-1077(IT)G, May 20, 1998 - The appellant should have listed a document under Rule 82(2)(b) and claimed privilege if it had an issue with respect to its production.

Re/Max Real Estate (Edmonton) Ltd. v. Border Credit Union Ltd. (1988), 60 Alta. L.R. (2d) 356 (Alta. Mast.)- Privileged documents must be listed whether producible or not.

Cross-reference: Rule 84 - *Listing Privileged Documents*.

Grounds of Objection

Confidentiality – Section 241 Income Tax Act

Slattery v. Doane Raymond Ltd., [1993] 3 S.C.R. 430, [1993] 2 C.T.C. 243, 93 D.T.C. 5443 - Disclosure of information obtained through tax returns or collected in the course of tax investigations may be necessary during litigation in order to ensure that all relevant information is before the court. Subsec. 241(3) of the *Income Tax Act* balances the privacy interest of the taxpayer with respect to financial information and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for effective administration and enforcement of the *Act* and other federal statutes referred to in subsec. 241(4) of the *Act*. The confidentiality provisions apply to any legal proceeding of a civil character which is not covered by the exception provided in subsec. 241(3) of the *Income Tax Act*. Proceedings taken by a trustee in bankruptcy under the *Bankruptcy Act* for a declaration that certain property was the property of a taxpayer bankrupt's estate were found to be proceedings "*relating to the administration or enforcement of*" the *Act.*

In re Glover, [1980] C.T.C. 531, 80 D.T.C. 6262 (Ont. C.A.); affirmed [1982] C.T.C. 29, 82 D.T.C. 6035 (S.C.C.)-The Court does not have the power to require the Minister of National Revenue to reveal confidential information secured under the *Income Tax Act* in the face of a direct prohibition in the *Act*.

Regina v. Snider, [1954] S.C.R. 479, [1954] C.T.C. 255, 54 D.T.C. 1129-The disclosure of a person's return of

income for taxation purposes is no more a matter of confidence or secrecy than that of his real property which is publicly disclosed in assessment rolls. It is in the same category as any other fact in his life and the production in Court of its details is an everyday occurrence. The statutory prohibition is against a voluntary disclosure and has no application to judicial proceedings. The Minister may claim privilege but only to the extent that the document or documents fall within the special facts or circumstances of prejudice to the public interest, the documents are in the custody of officials, and the Court may order them produced pursuant to a subpoena.

Harris v. The Queen, [2001] 2 C.T.C. 148, 2001 D.T.C. 5247 (F.C.A.) - Where a third party instituted proceedings to challenge the administrative act of an advance income tax ruling given to other taxpayers, those proceedings *"relate to"* the administration of the *Income Tax Act* and fell within the exceptions to the confidentiality requirements of s. 241. The exceptions are not limited only to legal proceedings undertaken by or on behalf of the Minister for the administration and enforcement of the *Income Tax Act*. In these circumstances, while s. 241 does not preclude the Minister from disclosing the identity of the taxpayer, which is *"taxpayer information"*, it is not the sole basis for determining the scope of the Crown's public interest immunity. Section 37 of the *Canada Evidence Act* may also be invoked by Crown to assert a claim of public interest immunity with respect to taxpayer information independently of s. 241.

Canada (Information Commissioner) v. Chairman of Canadian Cultural Property Export Review Board, 2001 D.T.C. 5677, 2001 FCT 1054 (F.C.T.D.), affirmed 2002 FCA 150 (F.C.A.) - Taxpayer information refers to information about specific taxpayers obtained through tax returns or collected during tax investigations that would reveal the person's identity. Until the person submits the information to Revenue Canada or such information is obtained in the course of an investigation, the information cannot be said to have been *"obtained"* by Revenue. Furthermore, the purpose of s. 241 is the protection of the confidentiality of information given to the Minister for the purposes of the *Income Tax Act*. Where that information has been publicly disclosed by the taxpayer or is generally known to be in the public domain and can be compiled with some effort, that individual's privacy interests cannot be said to have been breached.

The Queen v. Harris, [2000] 3 C.T.C. 220, 2000 D.T.C. 6373 (F.C.A.), leave to appeal refused (Oct. 26, 2000), Doc. No. 28041 (S.C.C.) - An action for a declaration brought by a taxpayer with public interest standing against the Minister for maladministration and preferential treatment given to other taxpayers is a legal proceeding that relieves it from the requirements of confidentiality in s. 241 of the *Income Tax Act*. Confidentiality concerns can be addressed through protections available in the Federal Court Rules.

Roseland Farms Ltd. v. The Queen (1995), [1996] 1 C.T.C. 176, 96 D.T.C. 6041, 104 F.T.R. 240 (note), 191 N.R. 214 (C.A.) - Section 179 of the *Income Tax Act* relating to *in camera* proceedings should be viewed in light of s. 241 of the *Act*, which requires a measure of confidentiality on the part of Crown employees. Confidentiality by itself does not, however, justify *in camera* proceedings.

The Queen v. Hassanali Estate, [1996] 2 C.T.C. 123, 96 D.T.C. 6414, 197 N.R. 51 (F.C.A.) - On a s. 174 application to join a taxpayer as a party to the appeal of another taxpayer, the existence of a waiver signed by that other taxpayer could have been disclosed without violating s. 241 as subsec. (3) provided adequate exemption.

Canada (A.G.) v. Bassermann (1994), 169 N.R. 109, 114 D.L.R. (4th) 104 (F.C.A.) - The prohibition in subsec. 241(2) of the *Income Tax Act* against disclosure in connection with any legal proceeding is subject to the exception in para. 241(3)(b) for proceedings relating to the administration and enforcement of the *Act*. Any privilege attaching to an income tax return is statutory and is that of the taxpayer, not the Minister. Given the

importance of confidentiality to the viability of Canada's self-assessing system income tax system, it might be desirable to ensure that the taxpayer have an opportunity to assert it.

The Queen v. Diversified Holdings Ltd., [1991] 1 F.C. 595, [1991] 1 C.T.C. 118, 91 D.T.C. 5029 (F.C.A.) - Documents related to actions taken by and on behalf of Revenue Canada which gave rise to litigation against the Crown were found not to contain confidential information obtained by the Minister in the course of general income tax procedures and investigations and were not protected from production by s. 241 of the *Income Tax Act*. The legislative intent of s. 241 is the protection of the confidentiality of information given to the Minister for the purposes of the *Act*. The privilege is not established in favour of Revenue Canada but in favour of those, particularly the taxpayer, who give information to the Minister on the understanding that such information will be confidential.

In re M.N.R. v. Huron Steel Fabricators (London) Ltd. and Fratschks, [1973] C.T.C. 422, 73 D.T.C. 5347 (F.C.A.) - Section 241 of the *Income Tax Act* did not apply to prevent production of the income tax returns of persons who were not parties to the income tax appeal as the Minister's assumptions in assessing the taxpayer had been based upon those returns. There is no basis for a conclusion that disclosures which the *Act* requires the taxpayer to make are confidential and there is no immunity from production in legal proceedings except to the extent that Parliament has expressly spelled out such immunity in the statute.

In Re Huron Steel Fabricators (London) Ltd. et al. v. M.N.R., [1972] C.T.C. 506, 72 D.T.C. 6426, [1972] F.C. 1007, 31 D.L.R. (3d) 110 (F.C.T.D.)-The only references to secrecy and confidentiality are contained in s. 179 of the *Income Tax Act,* which provides a right to request an *in camera* hearing. Subsecs. 241(1) and (2) of the *Act* are the sections which deal with confidentiality and because of subsec. 241(3) have no application once there are proceedings such as an appeal.

See also: *AMP of Can. Ltd. v. The Queen*, [1987] 1 C.T.C. 256, 87 D.T.C. 5157 (F.C.T.D.).

Weber v. Pawlik, [1952] C.T.C. 32, 52 D.T.C. 1059 (B.C.C.A.) - The statutory requirement of confidentiality, as it was then worded, was not sufficient to prevent production of the tax returns, but the Minister's affidavit claiming privilege was a complete answer. Even though the Crown has no interest in the documents sought, a party cannot compel their production by issuing a subpoena to anyone who is not their owner, but only a servant or agent. If a servant, having possession of his superior's documents, cannot produce them in Court, he cannot give oral evidence of them.

McAvan Holdings et al v. BDO Dunwoody Limited et al, [2003] 4 C.T.C. 90 (Ont. Sup. Ct.) – The purpose of the protection from disclosure provided for in s. 241 of the *Income Tax Act* is to protect a taxpayer’s privacy. Subsec. 241(5) authorizes the Minister to disclose information to the taxpayer or to someone else with the consent of the taxpayer. The Court cannot compel the Minister to produce documents without the taxpayer’s consent; however, subsec. 241(5) puts the documents within the control of the taxpayer. The taxpayer therefore cannot proceed with a civil action and hide CCRA documents from other parties to the lawsuit.

Capital Vision Inc. v. M.N.R., [2003] 2 C.T.C. 42 (F.C.T.D.) – The protection provided by s. 241 of the *Income Tax Act* co-exists with the rights and obligations provided by s. 231.2 of the *Act*. Reliance on s. 241 does not relieve the Minister from compliance with s. 231.2. Withholding the identity of the taxpayer being audited was not a proper basis for proceeding under s. 231.1 of the *Act*.

Gestion Yvan Drouin Inc. v. The Queen (2000), [2001] 2 C.T.C. 2315, 2001 D.T.C. 72 (Fr.) (T.C.C.) - The Tax Court of Canada has the power to order production of third party documents during discovery, notwithstanding s. 241 of the *Income Tax Act*, which imposes a requirement of confidentiality on the Minister.

SmithKline Beecham Animal Health Inc. v. The Queen, [2001] 2 C.T.C., 2086, 2001 D.T.C. 192 (T.C.C.), appeal dismissed 2002 FCA 229 (F.C.A.) - A particularly clear demonstration of relevance is required where a taxpayer asks a Revenue official on discovery for information furnished by a competitor to Revenue in accordance with the requirements of the *Income Tax Act*. Except in cases where the Minister has relied on information garnered from other taxpayers there are few, if any, circumstances in which information provided to the Minister by taxpayers other than the appellant will be relevant in a tax appeal.

Silicate Holdings Ltd. v. The Queen, [2001] 2 C.T.C. 2222, 2001 D.T.C. 299 (T.C.C.) - Just because the Minister, whether on purpose, by inadvertence, or by negligence, wrongfully filed or otherwise provided taxpayer information contrary to s. 241 does not mean that any further information should be released by the Minister. The court has no power to authorize a violation of the law.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 3 C.T.C. 123, 99 D.T.C. 5408 (F.C.T.D.) - Maintaining the strict confidentiality of taxpayer information is important, not only as a matter of fairness to individuals who are required by law to supply information to the Minister, but also for the effect of disclosure on the efficient administration of the *Income Tax Act*. If taxpayers become concerned about Revenue Canada's ability to keep confidential information about their financial affairs, they are likely to be less forthcoming in providing information that Revenue Canada requires for the expeditious and accurate assessment of tax liability.

Novacor Chemicals (Canada) Ltd. v. The Queen, [1999] 2 C.T.C. 145 (F.C.T.D.) - The Court ordered that an internal Revenue Canada investigation report be revealed to the plaintiff subject to counsel for the defendant editing it by blacking out those portions the disclosure of which would constitute a breach of s. 241 of the *Income Tax Act*.

In re Morin, [1998] G.S.T.C. 131, [1998] 10 W.W.R. 92 (Sask. Q.B.) - In bankruptcy proceedings the income of the bankrupt's common law spouse was relevant and as she drew her income from a private corporation disclosure of the income tax information of both was authorized under para. 241(4)(a) of the *Income Tax Act* on the principles set out by the Supreme Court in *Slattery*. The same could not be said of disclosure of her corporation's GST payment history and so no disclosure was permitted under para. 295(5)(a) of the *Excise Tax Act*.

Owen Holdings Ltd. v. The Queen, [1997] 3 C.T.C. 2286, 97 D.T.C. 380 (T.C.C.) - A court is bound by s. 241 of the *Income Tax Act* and cannot refuse to apply it, even on the grounds of equity.

Ladowsky v. M.N.R. (1996), 96 D.T.C. 6462 (F.C.T.D.) - There was no breach of s. 241 of the *Act* when the respondent disclosed confidential information from a wife's tax returns to her husband, where the husband had put her affairs in issue by alleging an intermingling of asset ownership and payments made to her.

Transamerica Life Insurance Co. v. Canada Life Assurance Co. (1995), 46 C.P.C. (3d) 110, 27 O.R. (3d) 291 (Ont. G.D.) - A statutory promise of confidentiality does not constitute an absolute bar to compelling production

of documents. Confidential information may be subpoenaed and introduced in evidence if ordered by a court unless Parliament has otherwise legislated. The general rule is that although information is confidential it must be produced unless the test laid down by the Supreme Court in *Slavutych v. Baker* is met.

Grant v. Morey, 55 D.T.C. 1089 (Ont. Master) - The Dominion and Provincial *Succession Duty Acts* prohibited employees of government departments from disclosing returns. The Master held that they were not privileged and should be part of the affidavit of production. The Master noted the relative unimportance of the disclosure of an individual's confidential affairs compared to the Court's supreme function of determining the issues fairly and justly.

Morrow v. Kime, 52 D.T.C. 1127 (Ont. Master) - Returns filed pursuant to the *Income Tax Act* are privileged, and copies in possession of a plaintiff being examined on discovery in a civil action are entitled to the same protection.

In re Geldart's Dairies, [1950] C.T.C. 434, 50 D.T.C. 727 (N.B.K.B.) - The trustee in bankruptcy of a corporation was entitled to the production of the tax returns of the bankrupt corporation without contravening the confidentiality provisions of the *Income Tax Act*. However, the Minister's assertion of Crown privilege prevented their disclosure.

Secondary Source: See Patrick Bendin, “*The Requirement of Confidentiality Under the Income Tax Act and Its Effect on the Conduct of Appeals Before the Tax Court of Canada*”, 1996 *Canadian Tax Journal*, Vol. 44 #3.

Note: Cases concerning public interest privilege should be read in light of the provisions of ss. 37 to 39 of the *Canada Evidence Act* – see Appendix A of *Tax Court Practice©*.

Disclosure Contrary to Foreign Law

Spencer v. The Queen, [1985] 2 S.C.R. 278 (S.C.C.) - The public and the courts have a right to the evidence of a resident and a citizen of Canada as to his knowledge about specific customers and transactions of a bank in the Bahamas, notwithstanding that the Bahamian *Banks and Trust Companies Regulation Act* makes it an offence to reveal such knowledge.

Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 90 A.R. 323 (Alta. C.A.) - Discovery transcripts in the United States action which were subject to a consent confidentiality order of a U.S. court were ordered produced in Alberta litigation. A party cannot prevent production of a relevant document otherwise subject to production in a Canadian court by its own action or inaction in another jurisdiction. The defendant was allowed a reasonable time in which to apply to the U.S. court to have the confidentiality ordered modified to permit production, failing which the depositions sought had to be produced.

Arab Banking Corp. v. Coopers & Lybrand, [1996] Q.J. No. 1436 (Q.S.C.) - Where a foreign bank brought an action in negligence against a firm of auditors in Quebec its deponent on an examination for discovery, could not invoke obligations of secrecy imposed on banks by the laws of Switzerland and Germany to avoid answering questions. While an article of the Quebec Civil Code would recognize a mandatory provision of the law of another country where the preponderant interests so required, the Court held that the evidence was inconclusive as to whether the banker's privilege constituted a mandatory provision under German and Swiss law. A crucial factor in this case was that the bank was before the court by choice as a litigant, and not simply in response to a

subpoena. Even if the provision was mandatory, under Canadian domestic law bank secrecy has very limited application and there is a fundamental rule that the Court has the right to every person's evidence. Finally, the Court held that the rules of international comity had to give way to the greater public interest of requiring the unrestricted testimony of this deponent.

Comaplex Resources International Ltd. v. Schaffhauser Kantonalbank (1991), O.J. No. 1643 (Ont. G.D.) - After hearing expert evidence on the banking secrecy laws of Switzerland, the Court held that those secrecy laws did not prohibit the disclosure of information or documentation in a foreign court where such information was produced or disclosure made under the threat of sanctions pursuant to a production or discovery order of that foreign court. Accordingly, the Swiss bank officer was ordered to answer relevant questions in a civil action in Ontario.

C.I.B.C. v. Molony (1986), 8 C.P.C. (2d) 53 (O.H.C.) - An Ontario Court would not compel production of documents sought in Ontario litigation which were held in New Jersey and subject to a protective court order binding all parties to litigation in that state. The Court would not impose an impossible burden where compliance would require violation of the order of a foreign court.

Foseco International Ltd. et al. v. Bimac Canada et al. (1980), 51 C.P.R. (2d) 51 (F.C.T.D.) - While a protective order of a U.S. Court covering documents and depositions does not have extraterritorial effect and was not binding on Canadian counsel for the parties the Federal Court would not make an order that would compel a party to produce documents in violation of the laws of another country. The solution was to have the U.S. court amend the order and for the Federal Court to issue a similar protective order concerning the confidential information.

Frischke v. Royal Bank (1977), 4 C.P.C. 279 (Ont. C.A.) - The Court upheld the bank's objection to producing, in a civil action, information and documents the disclosure of which would be contrary to the bank secrecy laws of Panama and which would render the bank's employees in Panama subject to civil and criminal penalties.

Disclosure Contrary to Domestic Law

Informant's Privilege

R. v. Mills (1999), 180 D.L.R. (4th) 1, 139 C.C.C. (3d) 321 (S.C.C.) - Canadian law has long recognized the importance of protecting the identity of police informers through an informer privilege, subject to the "*innocence at stake*" exception.

R. v. Leipert, [1997] 3 W.W.R. 457 (S.C.C.) - Informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same. It is of such importance that, once found, courts are not entitled to balance the benefit enuring from the privilege against countervailing considerations. The privilege belongs to the Crown; however, the Crown cannot, without the informer's consent, waive the privilege either expressly or by implication by not raising it. It applies in both criminal and civil proceedings.

Hunt v. T&N, [1993] 4 S.C.R. 289, 21 C.P.C. (3d) 269 (S.C.C.) - A Quebec statute which prohibited the out-of-

province production of documents was unconstitutional.

The Promex Group Inc. v. The Queen, [1998] 3 C.T.C. 2120, 98 D.T.C. 1588 (T.C.C.) - While the Crown has an obligation to make full disclosure to an appellant in an income tax appeal the Crown may refuse to disclose the identity of informants who gave information in confidence to the tax authorities.

Investigation Privilege

Novacor Chemicals (Canada) Ltd. v. The Queen, [1999] 2 C.T.C. 145, 99 D.T.C. 5615 (F.C.T.D.) - Investigation privilege is a qualified privilege which requires that the Court balance the relevance of the document against any possible harm to the public interest that might flow from revealing investigative techniques.

See also: *R. v. Richards* (1997), 34 O.R. (3d) 244, 115 C.C.C. (3d) 377 (Ont. C.A.).

Other Confidential Communications

M.A. v. Ryan, [1997] 1 S.C.R. 157, 207 N.R. 81, [1997] 4 W.W.R. 1 - Psychiatric patient records can be privileged in appropriate circumstances. The law of privilege may evolve to reflect the social and legal realities of our time, including *Charter* values. Once the first three requirements of the Wigmore test are met and a compelling *prima facie* case for privilege is established, the focus shifts to the balancing of interests under the fourth requirement. A relevant document may have to be disclosed in whole or in part, with conditions. Documents of questionable relevance or which may be obtained from other sources may be declared privileged. Fishing expeditions are not appropriate where there is a compelling privacy interest at stake, even at discovery.

A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536, 88 O.A.C. 241, 103 C.C.C. (3d) 92, 44 C.R. (4th) 91, 190 N.R. 329, 33 C.R.R. (2d) 87, 130 D.L.R. (4th) 422 - Private records held by third parties in which there is a reasonable expectation of privacy do not fall within a class privilege such as the solicitor-client privilege or the police informer privilege. The determination of whether such documents are privileged is done on a case by case basis using Wigmore's fourfold utilitarian test, which requires a showing that (1) the communications originated in a confidence they will not be disclosed; (2) the element of confidentiality is essential to the relation between the parties; (3) the relation is one which ought to be fostered; and (4) the injury of disclosure outweighs the benefit.

R. v. Fosty, (*sub nom. R. v. Gruenke*), [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, [1991] 6 W.W.R. 673, 8 C.R. (4th) 368 (S.C.C.) - There are two categories of privileged communications. First, the class of privilege that refers to a privilege recognized at common law and for which there is a *prima facie* presumption of inadmissibility. Such communications are excluded not because the evidence is not relevant, but because there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications fall within this first category. The second category of privileged communications is a case-by-case privilege where there is a *prima facie* assumption that the communications are not privileged. The case-by-case analysis involves an application of the Wigmore test which is that: (1) communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relationship must be one that ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained by the correct disposal of litigation.

A majority held that there was no class privilege for religious communications, which could not be said

to be like solicitor-client communications. The *prima facie* protection for solicitor-client communications is based on the fact that those communications are essential to the effective operation of the legal system and are inextricably linked with the system which desires the disclosure of the communications.

Religious communications can be excluded in particular cases where the Wigmore criteria are satisfied.

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574 - When information is provided in confidence, the obligation is on the confidee to show that the use to which the information has been put is not prohibited. The relevant question in establishing a breach of a duty of confidence is, *"What is the confidee entitled to do with the information?"* Any use other than a permitted use is prohibited and amounts to a breach of duty.

Slavutych v. Baker, [1976] 1 S.C.R. 254 - In tenure proceedings initiated by a university confidential communications made in good faith by an associate professor who had a legitimate interest in the proceedings could not later be used to his prejudice. The four fundamental conditions necessary to establish privilege against disclosure of communications are (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

Clark v. Law Society (Alberta), [2000] 11 W.W.R. 520, 20 C.B.R. (4th) 212 (Alta. C.A.) - Confidentiality is ordinarily wider than privilege. A lawyer may not voluntarily disclose to others any facts that he learns while representing a client. Some of those facts would not be privileged. Confidentiality only bars voluntary disclosure. It does not bar disclosure under compulsion of law of information which is merely confidential and is not privileged.

R. v. Dupont (1998), 165 D.L.R. (4th) 512, 129 C.C.C. (3d) 77 (Que. C.A.) - The fact that the *Code de déontologie des pyschologues* provides that psychologists are bound by professional confidentiality does not *ipso facto* permit the conclusion that there is a class privilege which prevents them from disclosing their communications with patients.

Molson Breweries v. Labatt Brewing Co., [1992] 3 F.C. 78 at 84, 144 N.R. 321 at 325 (C.A.) per MacGuigan J.A.:

> [T]he law leans against any fetter on the openness of proceedings, and . . . the normal way of reconciling the conflicting demands of openness and confidentiality, where required with respect to documents, is to disclose to parties' counsel any confidential information on their undertaking that they will maintain that confidentiality even from their clients. What is of capital importance is that disclosure should be limited as minimally as possible.

Crestbrook Forest Industries Ltd. v. The Queen, [1992] 1 C.T.C. 100, 92 D.T.C. 6412 (F.C.A.) - The Crown could not rely on confidential documents and information obtained for purposes unrelated to the appellant's income tax liability, and production of the documents and information for discovery, or at trial, could therefore not be permitted. The documents and information were obtained by a consultant acting for the Department of National Revenue in connection with a survey of wood pulp and newsprint exporters on the express basis that they would be kept confidential.

Hacock v. Vaillancourt (1989), 63 D.L.R. (4th) 205 (B.C.C.A.) - The public interest in the proper administration of justice outweighed in importance any public interest that might be protected by upholding an employer's claim to confidentiality in respect of statements given to it by an employee concerning the conduct of other employees.

***See also**: R. v. Delong* (1989), 47 C.C.C. (3d) 402 at 420-421 (Ont. C.A.).

Union of Canada Life Insurance v. Levesque Securities Inc. (1999), 42 O.R. (3d) 633, 1999 CarswellOnt 114 (Ont. Gen. Div.) - Documents provided by a non-party to a bank were held to be protected from disclosure at discovery on the basis of the common law privilege in *Slavutych v. Baker*, *supra*.

Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc. (1999), 172 D.L.R. (4th) 761, 33 C.P.C. (4th) 106 (Ont. Div. Ct.) - There is no rule or obligation of confidentiality that prevents a person who receives information in confidence from using that information to defend himself against a claim made against him by the same person who gave the confidential information to him. Privilege is waived by the person who gave the confidential information by the act of suing the recipient of the information on a cause of action to which the information is relevant.

The Promex Group Inc. v. The Queen, [1998] 3 C.T.C. 2128, 98 D.T.C. 1588 (T.C.C.) - The appellant was ordered to list documents subject to a confidentiality order in a provincial superior court in litigation between the appellant and another private individual.

Do-Ky v. Minister of Foreign Affairs & International Trade, [1997] 2 F.C. 907 (F.C.T.D.) - Similar to the solicitor-client privilege which allows for open and honest discourse between a solicitor and his or her client, the confidentiality of international communication allows states to negotiate delicate situations frankly and quickly.

Upjohn Inter-American Corp. v. Canada (Minister of National Health & Welfare), [1987] F.C.J. No. 234 (F.C.T.D.) - Confidentiality alone is not a separate head of privilege nor does confidentiality in itself justify the exclusion of evidence relevant to the trial or the determination of an issue unless it can be clearly demonstrated that the public interest would be better served by the exclusion of such relevant evidence. A court may order disclosure on terms that the information revealed will be used only for the purpose of the proceeding itself, which is an implied undertaking.

Negotiations and Settlements/Without Prejudice Correspondence

Marchischuk v. Dominion Industrial Supplies Ltd., [1991] 4 W.W.R. 673 (S.C.C.) - An admission of liability intended to facilitate settlement, which was not intended to operate to preclude reliance by the respondent on legal defences available to it should the case go to trial, could not serve as a basis for claims of either promissory estoppel or waiver.

Rush & Tompkins Ltd. v. G.L.C., [1989] 1 A.C. 1280 (H.L.) - The "*without prejudice*" rule is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish and applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence in any subsequent litigation connected with the same subject-matter. The application of the rule is not dependent upon the use of the phrase "*without prejudice*."

Comrie v. Comrie (2001), 197 D.L.R. (4th) 223, 203 Sask. R. 164 (C.A.) - The rule protecting "*without prejudice*" negotiations does not require exclusion when the evidence is offered for some purpose other than proving liability, such as proving bias or prejudice of a witness, fraud, negativing a contention of undue delay, or an effort to obstruct a criminal investigation or prosecution. Accordingly, an admission of fact made during unsuccesful negotiations for settlement or compromise may be admissible for certain purposes.

Costello v. City of Calgary (1997) 152 D.L.R. (4th) 453 (Alta. C.A.) - Communications made within the context of a litigious dispute, with the intention that they would not be used in court should negotiations fail, with the intention of attempting to effect a settlement, were protected by evidentiary privilege.

Bertram v. The Queen (1995), 96 D.T.C. 6034, 191 N.R. 218, [1996] 1 F.C. 756 (F.C.A.) - While there is an exclusionary rule or privilege which applies to protect evidence being given of negotiations leading to settlement, it did not apply in this case. Where an exchange between parties is not expressly held on a "*without prejudice*" basis the Court should be hesitant before concluding that such exchange was a settlement negotiation. The Court must be entirely satisfied that the purpose of the meeting was an honest mutual attempt to negotiate settlement and not something else. Where the purpose of the meeting is ambiguous or multiple or where the notion of settlement or compromise only arises incidentally or casually, the whole of the meeting is not protected. A party cannot keep to itself its view that the meeting is intended to negotiate a compromise; the intention must be common to both participants. Likewise, a meeting which would otherwise be "*with prejudice*" does not get converted to a privileged occasion by a party throwing in an offer of settlement as an aside or afterthought. A meeting with Revenue officials must be considered in the context of a self-assessing system where the taxpayer has the obligation to make full and open disclosure to the taxing authorities and where it is common for taxpayers and their advisers to meet with Revenue officials to attempt to persuade them that no tax is due. Even if the settlement privilege is otherwise applicable the rule does not operate to shield evidence of misrepresentation or of dishonest dealing.

Middlekamp v. Fraser Valley Real Estate Board (1992), 10 C.P.C. (3d) 109 (B.C.C.A.) - The public interest in the settlement of disputes generally requires "*without prejudice*" documents or communications to be privileged; however, there are exceptions to the general rule.

Re Springridge Farms Ltd. (1991), 79 D.L.R. (4th) 88 (Sask. C.A.) - A demand for payment of the original sum due was not a communication made with a view to settlement and should not have been excluded from evidence by the trial judge. Offers of settlement are not admissible in evidence nor are communications made with a view to settlement; however, portions of documents marked "*Without Prejudice*" and portions of settlement discussions may be admitted in evidence if they are severable from the subject of settlement and are relevant to a matter in issue.

Station Square Developments Inc. v. Amako Construction Ltd. (1990), 68 D.L.R. (4th) 743 (B.C.C.A.) - Settlement documents, whether they relate to an insurance claim or any other claim, may lead to the discovery of relevant facts, which will enable a party to advance its own case or to damage the case of its adversary.
Eccles v. McCannell (1984), 44 C.P.C. 43 (Ont. Div. Ct.) - Communications made with a view to reconciliation or settlement are protected from disclosure.

***See also**: I. Waxman & Sons Ltd. v. Texaco Can. Ltd.* (1968), 69 D.L.R. (2d) 543 (Ont. C.A.).

Azouz c. Canada (Procureur général) (2000), [2001] 1 C.T.C. 1, 195 F.T.R. 1 (F.C.T.D.), appeal allowed in part (2000), [2001] 3 C.T.C. 231, 2000 CarswellNat 2990 (F.C.A.) - A meeting held between representatives of the applicant and of the Investigations Section of the Canada Customs and Revenue Agency, in the absence of counsel for the parties, was held to be confidential. Information conveyed and a settlement offer made at the meeting could not be introduced into the evidence on a judicial review.

Revusky v. The Queen, [1997] 2 C.T.C. 2443 (T.C.C.) (I.P.) - Counsel should not have disclosed the existence of a written offer of settlement until after the Court's decision.

Simpson v. The Queen, [1996] 2 C.T.C. 2687, 25 R.F.L. (4th) 443 (T.C.C.) - Per Rip, J.:

> When a document is marked "*Without Prejudice*", the admissions of the person who made the document may not be used against him or her. This rule applies only where the document is made and sent in the course of negotiating an agreement and these negotiations fail. If negotiations result in an agreement, the document is admissible in evidence against its maker.

Yott v. M.N.R., [1991] 2 C.T.C. 2001, 91 D.T.C. 611 (T.C.C.) - Communications for the purpose of settling a case enjoy a privilege of non-disclosure without the parties' consent; however, telephone conversations between counsel were admitted in evidence because such communications may be tendered in proof of the fact of a settlement.

Litigation Privilege

Alfred Crompton Amusement Machines v. Customs & Excise Commissioners (No. 2), [1972] 2 All E.R. 353, [1972] 2 Q.B. 102 (C.A.), aff'd [1974] A.C. 405, [1973] 2 All E.R. 1169 (H.L.) - Privilege over documents in the hands of the Commissioners was extended to a point in time prior to their opinion of the proper tax to be paid. The Court found that a letter from the company to the Commissioners indicated that the company would challenge their proposal and such challenge might lead to litigation. All material gathered by the Commissioners after this point was gathered in anticipation of litigation.

The Queen v. Glaxo SmithKline, 2005 FCA 30 (F.C.A.) – Counsel is entitled to provide information to third parties and obtain comments on its use for litigation without having to disclose it to the other party, subject to any confidentiality agreement. Communications made by counsel to other persons in order to obtain information and the communications back to counsel are privileged. Counsel must be free to make full investigation and research without disclosing opinions, strategies and conclusions to opposing counsel.

YBM Magnex International Inc., Re, [2001] 2 W.W.R. 628, 88 Alta. L.R. (3d) 181 (C.A.) - Litigation privilege protects documents from disclosure during litigation provided that the dominant purpose of the creation of the documents is to submit the documents to a lawyer for advice and use in current or anticipated litigation. For example, a lawyer's client obtains the written opinion of an expert to give to his lawyer to further the anticipated or current litigation. Common interest privilege extends litigation privilege where the document or information has been shared with a third party provided that party has a common interest with the client in the same anticipated or current litigation. The exchange of documents among those having a common interest does not operate to waive litigation privilege.

Edgar v. Auld (2000), 184 D.L.R. (4th) 747, 43 C.P.C. (4th) 12 (N.B.C.A.) - Litigation privilege did not apply to hospital records and other records of treatment that were simply gathered by a solicitor for the purposes of litigation. They were not created for the dominant purpose of litigation. Our system of civil procedure is founded on the general rule that the interests of justice are best served if parties to litigation are obliged to disclose and produce for the other's inspection all documents in their possession, custody, or power relating to the issues in the action.

Morrissey v. Morrissey (2000), 196 D.L.R. (4th) 94, 196 Nfld. & P.E.I.R. 262 (Nfld. C.A.) - Litigation privilege owes its origins to solicitor-client privilege, but the two privileges are separate and the reasons for their existence are quite distinct. The underlying rationale of litigation privilege is to enable parties to properly prepare their cases and to permit investigation of facts and development of strategy without fear that either might be revealed to the opposing party. It is believed that inefficiency and unfairness would result if litigation privilege were not available. For example, a party might fail to investigate for fear of what might be revealed about the weakness of his case. This type of behaviour would not promote settlement. Litigation privilege recognizes that relevant information will be withheld from the other party; however, it does not afford a privilege against the discovery of relevant facts.

Dupont Canada Inc. v. Emballage St-Jean Ltée (2000), 266 N.R. 366, 193 F.T.R. 160 (note) (F.C.A.) - Test results obtained at a lawyer's request in contemplation of litigation are nonetheless facts. They are not legal advice, opinion, or evaluation. Where those facts related to an allegation of fact in the pleading of the party that had the testing done, a question relating to the test results had to be answered and it was immaterial that the facts were discovered through a lawyer. Neither litigation privilege nor solicitor-client privilege affords a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue.

Hill (Litigation Guardian of) v. Arcola School Division No. 72 (1999), 170 D.L.R. (4th) 539, [1999] 11 W.W.R. 360 (Sask. C.A.) - Written witness statements, prepared for the purpose of litigation, are privileged and need not be disclosed. However, the facts relevant to the case, whether reflected in the privileged documents or not, are not privileged, and must be disclosed if sought by one party from the other in a proper way, such as through examination for discovery. The names of all potential witnesses fall into the category *of "facts that are or may be relevant to the determination of the facts in issue*"; however, the name of the individual who conducted an investigation does not.

General Accident Assurance Co. v. Chrusz (1999), 180 D.L.R. (4th) 241, 45 O.R. (3d) 321 (Ont. C.A.) - Litigation privilege is not rooted in the necessity of confidentiality in a relationship. It is a practical means of assuring counsel a "*zone of privacy*". It is only available where preparing for litigation was the dominant purpose for which the document was prepared. It does not apply to a document that simply appears in the course of investigative work. Copies of relevant documents that are obtained by counsel after contemplation of litigation are therefore not privileged. Common interest litigation privilege may exist although the information sought to be protected is shared with a third party, where several persons have a common interest in anticipated litigation. This may be so even though it transpires that, after the litigation is commenced, only one of the persons has been made a party.

Web Offset Publications Limited v. Vickery (1999), 43 O.R. (3d) 802, 1999 CarswellOnt 2270 (Ont. C.A.) - Statements made to a solicitor by a potential witness were held to be absolutely privileged and hence not subject to a claim for defamation.

Specialty Steels v. Suncor Inc., [1998] 3 W.W.R. 216, (1997) 54 Alta. L.R. (3d) 246 (Alta. C.A.) - The time of a document's creation is the time for assessing its dominant purpose. Although an investigation report was requested at a time when no litigation was contemplated, legal proceedings were commenced before the report was completed. The report was protected by litigation privilege.

General Accident Insurance Co. v. Chrusz (1998), 37 O.R. (3d) 790 (Ont. Div. Ct.) - Solicitor-client privilege attached to an adjuster's communications with a solicitor once he was given instructions by the insurance company to deal with the solicitor for the purpose of obtaining legal advice on a possible claim by the insured. Such communications always remain privileged, unless the privilege is waived. A statement taken under oath which became part of the solicitor's brief for litigation then contemplated also remained privileged. Giving a copy of the statement to the witness did not waive privilege in it. Records which were in existence before the solicitor met with the witness did not acquire privilege simply because they ended up in the solicitor's hands. A copy of an original document incorporated by a solicitor into his litigation brief becomes privileged, but that privilege does not extend to the original.

Cross v. Assuras, [1996] 139 D.L.R. (4th) 473, [1996] 10 W.W.R. 367 (Man. C.A.) - Although the report of an investigation may be ordered for many purposes and to address many questions, the Court must be satisfied that the dominant purpose for its production is for litigation purposes before privilege will attach to the report.

Moseley v. Spray Lakes Sawmills (1980) Ltd. (1996), 135 D.L.R. (4th) 69, 39 Alta L.R. (3d) 141 (C.A.) - The rationale for litigation privilege provides an essential guide for determining the scope of its application. Its purpose is to protect from disclosure the statements and documents which are obtained or created for the dominant purpose of preparing one's case for litigation or for anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation. As a rule, this preparation will be orchestrated by a lawyer, though in some cases parties themselves will initiate certain investigations with a view to providing information for the "*lawyer's brief*". The litigation may already be pending or simply contemplated. There may even be relatively rare situations where a party intends to represent himself or herself throughout litigation proceedings, and gathers statements and documents specifically for the contemplated litigation. Privilege may well attach to such material, even though no lawyer is to be "*briefed*".

Piercy v. Piercy, [1990] 6 W.W.R. 274, 43 C.P.C. (2d) 64 (B.C.C.A.) - Commenting upon the privilege attaching to a solicitor's brief, the Court set aside an order prohibiting petitioner's counsel from communicating to anyone outside her firm the information she had noted during a taxation hearing in respect of the account of the respondent's former counsel, as it might prohibit her from discussing important aspects of her client's case with the client or with potential witnesses, and was an unjustified interference with the manner in which counsel is entitled to conduct her client's case. The privilege for a solicitor's brief is inviolate. The purpose of the privilege is to ensure that a solicitor may, for the purpose of preparing to give advice or conduct proceedings, proceed with complete confidence that the protected information or material he or she gathers from clients and others for this purpose, and the advice he or she gives will not be disclosed to anyone except with the consent of the client.

Ottawa-Carleton v. Consumers' Gas Co. (1990), 74 O.R. (2d) 637 at 642, 74 D.L.R. (4th) 742 (Div. Ct.) per O'Leary J.:

> [N]either an original document nor a copy thereof becomes privileged simply because it gets into the hands of a solicitor. It is only where the original itself was prepared with the necessary dominant purpose

> or the copy thereof was prepared with the requisite purpose that the original or copy respectively are privileged.

Dubai Bank Ltd. v. Galadari, [1989] 3 All E.R. 769 (C.A.) - Privilege did not attach to a photocopy made for the purpose of obtaining legal advice because the original affidavit did not come into existence for the purpose of obtaining legal advice or assembling evidence for trial.

Compare: *Hodgkinson v. Simms* (1988), 36 C.P.C. (2d) 24 (B.C.C.A.) - A lawyer exercising legal knowledge, skill, judgment, and industry who has assembled a collection of copies of documents for the purpose of advising on or conducting anticipated or pending litigation may claim privilege and refuse production regardless of whether the originals of the documents are privileged.

> Per McEachern C.J.B.C. at 30:
>
> In my view it is highly desirable to maintain the sanctity of the solicitor's brief which has historically been inviolate.

And at 32:

> In my view the purpose of the privilege is to ensure that a solicitor may, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information or material he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his client. Thus it appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely, (a) confidential communications with a client, and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co. (No. 1) (1988), 90 A.R. 323 (C.A.) - Working papers prepared by a firm of accountants retained by a law firm and a study of costs prepared to respond to a formal inquiry under the *Combines Investigation Act* were privileged as the dominant purpose in their preparation was contemplation of litigation. The discontinuance of the inquiry did not end the privilege. Further, to produce a privileged document to one party to litigation for the purpose of settlement or any other purpose does not show any intention that the privilege is to terminate as to other parties or in related litigation. Waiver depends on intention, and production by a co-defendant over whom the party has no control does not demonstrate that intention.

Discovery transcripts from another action are confidential in that they may not be used for an improper purpose but they are not privileged. The fact that the transcripts were subject to a consent confidentiality order of a U.S. court was no bar. A party cannot prevent production of a relevant document otherwise subject to production in a Canadian court by its own action or inaction in another jurisdiction.

Nova, An Alberta Corporation v. Guelph Engineering Company (1984), 30 Alta. L.R. 183 (Alta. C.A.) - Legal professional privilege can only be justified on the basis of the adversary system that now calls for a broad

discovery process. Accordingly legal professional privilege should be given a narrow rather than a broad scope. The proper test to apply is that prescribed by the House of Lords in *Waugh v. Br. Ry. Bd.* (1980), A.C. 521, (1979) 2 All E.R. 1169. The test is narrow and favours production. A party need not produce a document otherwise subject to production if the dominant purpose for which the document was prepared was submission to a legal advisor for advice and use in litigation (whether in progress or contemplated). The privilege does not apply if a substantial purpose for the preparation of the document was obtaining the advice of counsel but there were other purposes such as providing information to management.

Buttes Gas & Oil Co. v. Hammer (No. 3), [1981] Q.B. 223, [1980] 3 All E.R. 475 (C.A.); varied for other reasons [1982] A.C. 888, [1981] 3 All E.R. 616 (H.L.) per Lord Denning at p. 243:

> There is a privilege which may be called a "*common interest*" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him-who have the self-same interest as he-and who have consulted lawyers on the self-same points as he-but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation-because it affects each as much as it does the others. Instances come readily to mind. In all such cases I think the courts should-for the purposes of discovery-treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

Canadian National Railway v. McPhail's Equipment Co., [1978] 1 F.C. 595, 16 N.R. 295 (F.C.A.) - An appraisal prepared at the request of the CNR in support of a decision to expropriate obtained for budget allocation and negotiation purposes before it had consulted its solicitors in a type of matter which might be potentially litigious was not privileged. Communications between a party and a nonprofessional agent are only privileged if they are made both (1) for the purpose of being laid before a solicitor or counsel for the purpose of obtaining advice or enabling counsel to prosecute or defend an action or prepare a brief; and (2) for the purpose of litigation existing or in contemplation at the time.

General Motors Acceptance Corp. of Canada v. The Queen, [1999] 3 C.T.C. 2056, [1999] T.C.J. No. 228 (T.C.C.) - The Court rejected a call for the Crown to satisfy the Court that each document in the appellant's file in Revenue's Head Office Appeals Branch for which a litigation privilege had been claimed was prepared for the "*dominant purpose*" of litigation. Potential litigation respecting income tax assessments is always present because every assessment is subject to litigation procedures contained in the very statute that authorizes the assessment.

Novacor Chemicals (Canada) Ltd. v. The Queen, [1999] 2 C.T.C. 145 (F.C.T.D.) - An internal report prepared by an investigator at Revenue Canada was held not to be protected by solicitor-client privilege. Although it spoke of the possibility of a prosecution, the Court did not see, in that bare fact alone, an indication that the document was prepared in contemplation of litigation.

Vancouver Trade Mart Inc. (Trustee of) v. Attorney General of Canada, [1998] 1 C.T.C. 79, 97 D.T.C. 5520 (F.C.T.D.) - The court referred to the "*brief*" privilege stated by Jackett P. in *Susan Hosiery Ltd. v. M.N.R.* (1969), 69 D.T.C. 5278 (Ex. Ct.), and quoted from *Cross on Evidence*, 6th ed. (London: Butterworths, 1985) at 388-389:

> It is pointed out in para. 17 of the 16th Report of the Law Reform Committee that the privilege covers three kinds of communication:
>
> (a) communications between the client or his agents and the client's professional legal advisers;
>
> (b) communications between the client's professional legal advisers and third parties, if made for the purpose of pending or contemplated litigation;
>
> (c) communications between the client or his agent and third parties, if made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.

Applying the "*dominant purpose*" test, the court held that the work sought to be protected as privileged was not undertaken so as to enable counsel to give legal advice. Rather, the documents were created by the trustee in discharging duties under the *Bankruptcy Act*.

Toronto-Dominion Bank v. Leigh Instruments (Trustee of) (1997), 35 O.R. (3d) 273 (Ont. G.D.) - Litigation privilege is not waived where a party merely refreshes memory from a privileged communication.

Professional Institute of the Public Service of Canada v. Canadian Museum of Nature, [1995] 3 F.C. 643, 102 F.T.R. 7, 63 C.P.R. (3d) 449 (F.C.T.D.) - The litigation privilege applies to protect from disclosure communications between a solicitor and a client as well as with third parties so long as the dominant purpose for the making of the communications is preparation for any existing or reasonably contemplated litigation. The dominant purpose is to be assessed as of the time at which a document is brought into existence, not from its subsequent use. In this case the privilege over accounting documents was waived by voluntary disclosure of them to the Auditor General.

Armeco Construction Ltd. v. Canada (1994), 83 F.T.R. 107, 17 C.L.R. (2d) 84 (F.C.T.D.-Proth.) - The Federal Court has adopted the dominant purpose rule set out by the House of Lords in *Waugh v. British Railways Board*, [1980] A.C. 521 (H.L.). Cases decided before 1980 must be used with caution. To be privileged the dominant purpose of the document in question must be submission to a legal adviser in view of litigation, but that dominant purpose does not mean sole purpose. The rule applies to reports commissioned by lawyers but when a lawyer commissions a report which is used to give advice to the client that is a factor going to establish dominant purpose if litigation was a reasonable expectation.

Jesionowski v. Gorecki (1993), 55 F.T.R. 1 (F.C.T.D.) - Litigation privilege is the privilege which attaches to communications between a lawyer and a third party when the dominant purpose of the communication is to enable the lawyer to advise or act with regard to litigation and is not the same as solicitor-client privilege. The preliminary drafts or working papers of the expert are not privileged if the expert is called as a witness. Where an expert report was prepared for settlement purposes and privileged, it lost that status when it was listed in Part I of a Federal Court list of documents and produced. The privilege for communications in furtherance of settlement

requires that the communication be part of a genuine attempt to settle the dispute and in addition it must be clear, explicitly or implicitly, that the communication was intended to be kept confidential.

Secondary Source. See also: "*Claiming Privilege in the Discovery Process*", *Law in Transition: Evidence, Special Lectures of the Law Society of Upper Canada* (Don Mills, Ont: DeBoo, 1984) 163 at pp. 164-65:

> Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

Cross-reference: Expert Evidence-Production of Documents When Testifying, c. 17 of *Tax Court Practice*©.

Solicitor-Client Privilege

Pritchard v. Ontario (Human Rights Commission), [2004] S.C.J. No. 16 – Solicitor-client privilege applies where in-house counsel gives legal advice but not when advice is given in an executive or non-legal capacity outside the realm of their legal responsibilities. Whether the privilege will attach depends upon the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered. Where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. The common interest exception has been narrowly expanded to cover situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest, including trustee-beneficiary situations, fiduciary aspects of Crown aboriginal relations, and certain contractual or agency relations.

Maranda v. Richer, [2003] 3 SCR 193 (SCC) – A lawyer's client is entitled to have all communication made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer 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. When authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege.

R. v. Lavallee, Rackel & Heintz, [2002] 4 C.T.C. 143 (S.C.C.) – The name of a client may be protected by solicitor-client privilege, although this is not always the case. The termination of the solicitor-client relationship does not displace the duty owed by the solicitor to the client.

R. v. McClure, [2001] 1 S.C.R. 445, 40 C.R. (5th) - Solicitor-client privilege must be as close to absolute as possible. It will only yield in clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis. It should be set aside only in the most unusual cases. Solicitor-client privilege should be set aside only after stringently applying the innocence at stake test. Before the test is even considered the accused must establish that the information is not available from any other source and he is otherwise unable to raise a reasonable doubt as to his guilt in any other way. It is not enough to want the privileged material to mount a more complete defence. The innocence at stake test is applied in two stages. First the accused

seeking production of the solicitor-client communication must provide some evidentiary basis upon which to conclude that there exists a communication that could raise a reasonable doubt as to guilt. If the trial judge is satisfied that such an evidentiary basis exists, then the trial judge must examine the solicitor-client file to determine whether there is a communication that is likely to raise a reasonable doubt. If the second stage of the test is met then the trial judge should order production of the portion of the file necessary to raise the defence claimed.

R. v. Shirose (1999), 133 C.C.C. (3d) 257, (sub nom. *R. v. Campbell*) [1999] 1 S.C.R. 565, 171 D.L.R. (4th) 193 (S.C.C.) - Advice given by Department of Justice counsel in this case fell within the definition of solicitor-client privilege. The fact that the advice is given by a salaried *"in-house"* government legal service does not affect the creation or character of the privilege but not everything done by a government or other lawyer attracts privilege. Government lawyers may participate in operating committees of their respective departments or may offer policy advice which would not be privileged. By the same token, private practitioners may offer advice on purely business matters which would not be privileged.

Smith v. Jones (1999), 22 C.R. (5th) 203, [1999] 1 S.C.R. 455 (S.C.C.) - Client communications with third party experts retained by counsel for the purpose of preparing a criminal defence are protected by solicitor-client privilege subject to disclosure for public safety reasons where there is a clear, serious and imminent danger. The scope of such disclosure must be as narrow as possible and not reveal conscripted evidence.

R. v. Wijesinha, [1995] 3 S.C.R. 422, 186 N.R. 169, 127 D.L.R.(4th) 242 - Communications made in order to facilitate the commission of a crime or fraud will not be confidential regardless of whether the lawyer is acting in good faith.

Goodman Estate v. Geffen (1991), 127 N.R. 241, 81 D.L.R. (4th) 211 (S.C.C.) - The confidentiality of communications between solicitor and client survives the death of the client and enures to his or her next of kin, heirs or successors in title.

Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860 - Where legal advice is sought by a client from a lawyer the related communications are protected from disclosure.

R. v. Solosky, [1980] 1 S.C.R. 821 at 833 per Dickson J.:

> The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice.
>
> 8 Wigmore, *Evidence*, McNaughton Rev. (Boston: Little, Brown, 1961), para. 2292:
>
> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

Minter v. Priest, [1930] A.C. 558 at 573 (H.L.) per Viscount Dunedin:

> Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should

act as his solicitor, nevertheless the interview is held as a privileged occasion.

A.G. Can. v. Williamson, 2003 D.T.C. 5658 (F.C.A.) – Solicitor-client privilege can apply when the client is a department of government and the advising solicitors are in the employ of the Department of Justice. The burden of establishing solicitor-client privilege lies with the person who seeks to invoke the privilege. Evidence should be provided by the client that legal advice was sought and obtained through the particular document in question and it was contemplated that the advice obtained would be confidential.

Gower v. Tolko Manitoba Inc. (2001), 196 D.L.R. (4th) 716, [2001] 4 W.W.R. 622 (Man. C.A.) - Legal advice privilege is not dependent upon there being litigation in progress or even in contemplation at the time the communication takes place. Rather, what must be present is the provision of legal advice as one of the purposes of the document. Legal advice privilege would not be available where a lawyer has merely been asked to peform a fact-finding function. However, where fact gathering was held to be inextricably linked to the provision of legal advice, the report of a lawyer containing a statement of facts was protected from disclosure. So long as one of the parties to a communication containing legal advice is a lawyer, privilege will attach, even though the lawyer is not called to the bar in the relevant jurisdiction.

Rice v. Lamey (Litigation Guardian of) (2000), 190 D.L.R. (4th) 486, 20 C.C.L.I. (3d) 285 (N.B.C.A.) - Solicitor-client privilege arises where an adjuster, as agent of the client, carries out an investigation at the direction of the client's lawyer and as a result produces documents to assist the latter in advising the client. If there was evidence that the lawyer was no more than a conduit for the documents, privilege would not arise.

1185740 Ontario Ltd. v. M.N.R. (1999), 247 N.R. 287, 169 F.T.R. 266 (note) (F.C.A.) - Where there is a challenge to a claim of solicitor-client privilege, a court must examine the actual statements said to be privileged in order to draw a conclusion as to whether privilege arises or whether it has been waived.

Global Petroleum Corp. v. CBI Industries Inc. (1998), 172 D.L.R. (4th) 689, 172 N.S.R. (2d) 326 (N.S.C.A.) - Privilege cannot be used to protect facts from disclosure if those facts are relied upon by a party in support of its case. It is immaterial that the facts were discovered through the solicitor or as a result of the solicitor's direction.

Stevens v. Canada, [1998] 4 F.C. 89, (1998) 161 D.L.R. (4th) 85, (1998) 228 N.R. 142 (F.C.A.) - Any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. There is no distinction in the degree of protection provided by the rule whether the client is an individual, a corporation, or a government body. Only communications are protected by the privilege. Acts of counsel or mere statements of fact are not protected. Solicitor's bills of account are privileged, but trust accounts and other accounting records are not. It is only acts and statements that relate directly to the seeking, formulating or giving of legal advice that are privileged. The matter of whether there has been a waiver of privilege by the client must be judged according to all of the circumstances.

McRae v. Canada (Attorney General), [1998] 8 W.W.R. 574, 46 B.C.L.R. (3d) 137 (B.C.C.A.) - Solicitor-client privilege is indispensable to the structure of our justice system. It is not to be lightly disregarded. Nevertheless, the defendant was not entitled to privilege over communications in which the plaintiff had a joint interest. Where parties have a joint interest in an action there is no privilege between them.

Canada (Attorney General) v. Sander, [1996] 1 C.T.C. 74, 91 B.C.L.R. (2d) 145 (B.C.C.A.) - Solicitor-client

privilege is the private fundamental civil and legal right of the client. It exists to ensure the full and frank disclosure by the client to the solicitor of all information required to enable the latter to give informed advice in connection with ongoing or pending litigation. It exists for the protection of the client, and is necessary for the effective operation of the legal system. If a claim of solicitor client privilege fails, a claim of public interest immunity may still prevail if the content or the character of the information in question is such that the specified public interest on which the claim is advanced outweighs the public interest in disclosure. A claim for public interest immunity under section 37 of the *Canada Evidence Act* does not include the common law concept of solicitor-client privilege.

Buffalo v. Canada, [1995] 2 F.C. 762, 125 D.L.R.(4th) 294, 84 N.R. 139 (F.C.A.) - There are two distinct branches of privilege. The litigation privilege protects from disclosure all communications between a solicitor and client, or third parties, which are made with the dominant purpose of preparation for any existing or contemplated litigation. Privilege in relation to litigation is not limited to advice. It extends to communications in respect of any litigation, actual or contemplated. The legal advice privilege protects all communications, written or oral, between a solicitor and a client that are directly related to the seeking, formulating, or giving of legal advice. It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice. It is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context. Between private parties, where there is a trust relationship, no privilege attaches between a solicitor and the trustee as against the beneficiaries who have a joint interest with the trustee in the subject matter of the communications. That principle cannot be applied without restriction to the Crown, which wears many hats. Each document must be examined to see if the legal advice related to the administration of a `*trust*' or some other government interest.

Solicitor-client privilege is not to be interfered with except to the extent absolutely necessary and any conflict should be resolved in favour of protecting confidentiality.

A party that claims a document is privileged has the onus of establishing that privilege. Where the privilege claimed is that of solicitor and client the judge must examine the document before determining that privilege attaches.

Geo. Cluthe Manufacturing Co. v. ZTW Properties Inc. (1995), 23 O.R. (3d) 370 (Ont. Div. Ct.) - The privilege attaching to confidential communications between solicitor and client is the privilege of the client. That privilege can be waived only by the client, not by the solicitor. The court may not authorize a solicitor to disregard the privilege, absent waiver by the client.

Syncrude Canada Ltd. v. Babcock & Wilcox (1992), 10 C.P.C. (3d) 388 (Alta. C.A.) - Privilege can only be waived by the client owning it or his agent, not by strangers. Mere loss of physical control over documents does not destroy privilege.

Hunter v. Canada (Consumer & Corporate Affairs), [1991] 3 F.C. 186 (F.C.A.) - A court that has to rule on a claim of privilege with respect to the production of a document may not order that the document be produced in order to facilitate argument on the question of privilege.

Proctor & Gamble Co. v. Nabisco Brands Ltd./Nabisco Brands Lteé (1989), 24 C.P.R. (3d) 570, 97 N.R. 379 (F.C.A.) - Where a claim of solicitor–client privilege over a document is contested, a judge must not merely rely on affidavit evidence describing the document but must read it.

R. v. Littlechild, [1980] 1 W.W.R. 742 (Alta. C.A.) - Conversations held with a solicitor's agents for the purpose of retaining him are privileged even though the solicitor was not ever retained.

Graham Construction & Engineering (1985) Ltd. v. The Queen, [2003] 1 C.T.C. 2373 (T.C.C.) – A motion to exclude documents as privileged should have been made before the trial judge, as all the circumstances and facts would then be before the court, and the trial judge could make the most informed decision.

Belgravia Investments Ltd. v. The Queen, [2002] 3 C.T.C. 482 (F.C.T.D.) – Although certain documents may be protected against disclosure because they are privileged, the facts contained in those documents or the documents from which those facts were drawn are not privileged from discovery if otherwise producible. No automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer. A privileged communication need not request or offer legal advice if it can be placed in a cotinuum of communication in which a lawyer offers advice. Documents which relayed business advice, statements of fact or merely conveyed information about a potential investment in a transaction were not privileged.

AFS & Co. Ltd. Partnership No. 5 v. The Queen, [2001] 3 C.T.C. 1, 2001 D.T.C. 5330 (F.C.T.D.) - It is necessary to distinguish between documents that may be protected against disclosure and facts that may be contained in those documents or other documents from which those facts were drawn which may otherwise be discoverable. Also, no automatic privilege attaches to documents that are not otherwise privileged simply because they come into the hands of a party's lawyer. The party asserting the privilege carries the evidentiary burden to show on a balance of probabilities that the documents in question are a communication between a solicitor and a client which involve the seeking of legal advice and which the parties intend to be confidential. In this action the court found that for some documents for which privilege was claimed as solicitor's work product, that solicitor client privilege attached to the notations on the documents but not to the documents themselves as it had not been established that the documents were created by the solicitors and did not emanate from sources other than the clients.

Stevens v. Canada (Commission of Inquiry) (2000), 187 F.T.R. 228, [2001] 1 F.C. 156 (F.C.T.D.) - Solicitor and client privilege protects communications but it does not protect the facts contained in the communication or the acts a solicitor performs on behalf of his or her client.

Interprovincial Pipe Line (NW) Ltd. v. The Queen, [1999] 4 C.T.C. 2599, 99 D.T.C. 1180 (T.C.C.) - There is a privilege to communications between solicitor and client unless the commission of crime or fraud is in question. In order to compel production of documents over which the privilege has been claimed, particulars of the crime or fraud must be pleaded and proven. It is not the law that alleging a civil wrong by a third party will defeat the privilege.

Flack v. Pacific Press Ltd. (1970), 74 W.W.R. 275 (B.C.C.A.) - No communication made by or on behalf of the opposite party to the party from whom production is sought falls within the class of documents protected by solicitor-client privilege.

Novacor Chemicals (Canada) Ltd. v. The Queen, [1999] 2 C.T.C. 145, 99 D.T.C. 5615 (F.C.T.D.) - An internal report prepared by an investigator at Revenue Canada was held not to be protected by solicitor-client privilege.

Burnett v. M.N.R., [1999] 1 C.T.C. 31, (1998) 158 F.T.R. 146 (F.C.T.D.) - A memorandum written on the client's stationery respecting cheques to be drawn by a lawyer from the client's trust account was held to be protected from disclosure by solicitor-client privilege. A cheque requisition by a law firm was held not to be protected from disclosure by solicitor-client privilege as it fell within the statutory exception set out in para. 232(1)(e) of the *Income Tax Act*.

General Motors Acceptance Corp. of Canada v. The Queen, [1999] 3 C.T.C. 2056, [1999] T.C.J. No. 228 (T.C.C.) - Department of Justice communications with the Head Office Appeals Branch concerning a proposed reassessment were privileged. It was wrong to argue that Justice was carrying out the assessing function in providing a client with legal advice.

Whirlpool Corp. v. Camco Inc. (1997), 127 F.T.R. 268 (F.C.T.D.) - Communications between a Canadian patent agent who was not an attorney and an American lawyer were not privileged as the American lawyer was not competent to give legal advice to American clients on questions of Canadian law.

Deloitte & Touche Inc. v. A.G. Can., 97 D.T.C. 5520 (F.C.T.D.) - A trustee in bankruptcy's working papers, including year end adjusting journal entries, working trials balances, shareholder's account analyses and other analyses were prepared as part of the mandate of a trustee and not for the dominant purpose of submission to legal advisers in order to obtain legal advice.

Interprovincial Pipe Line Inc. v. M.N.R. (1995), 95 D.T.C. 5642, [1996] 1 F.C. 367, 102 F.T.R. 14 (F.C.T.D.) - A claim of solicitor-client privilege over notes of legal opinions prepared by accountants during the course of an audit was upheld. It was in the course of an audit under the CBCA and any waiver of privilege was limited. Documents provided by the accountants to legal counsel to give advice to the applicants were also privileged as solicitor-client privilege extends to advice provided by professionals retained by counsel in the course of preparation of legal advice. As well, the applicants were unaware of the disclosure by their accountants, and the accountants had no authority to waive privilege.

Pratt & Whitney Canada Inc. c. The Queen, [1997] 2 C.T.C. 2378, 97 D.T.C. 617 (T.C.C.) - A legal opinion from the Department of Justice to a Revenue Canada auditor prior to assessing, as to the effect of an agreement between the appellant and Industry Canada, was privileged and did not have to be produced on discovery. The basis for the assessment is the facts and statutory provisions set out in the reply to the notice of appeal, not legal opinions received before assessing.

Canadian Jewish Congress v. Canada (Minister of Employment & Immigration) (1995), 93 F.T.R. 172 (T.D.) - Solicitor-client privilege applies where the client is a department of government and the advising solicitors are the Department of Justice.

Fraser & Beatty v. Canada, [1994] 1 C.T.C. 267, 86 B.C.L.R. (2d) 78 (S.C.) - The mere statement that litigation documents came to a law firm as part of a brief for a tax appeal does not automatically cloak them with privilege. The Minister is entitled to a judicial inspection of the documents to ensure that judgments made by the petitioner are correct.

Eastwood & Co. v. M.N.R. (1993), [1996] 1 C.T.C. 67 (headnote), 94 D.T.C. 6411 (B.C. S.C.) - Conveyancing documents and statements of account which were essentially documents of fact, did not attract solicitor-client privilege. Documents whereby the law firm was providing legal advice were privileged.

Gregory v. M.N.R., [1992] 2 C.T.C. 250, 56 F.T.R. 285, 92 D.T.C. 6518 (F.C.T.D.) - All communications between client and solicitor wherein a legal opinion is given is subject to the solicitor-client privilege. Documents, not accounting documents, prepared by third parties, for and on behalf of a solicitor would be subject to the privilege only if the documents were prepared for the purposes of litigation or in contemplation of litigation. Accounting documents are different. Accounting documents would be subject to solicitor-client privilege if the accountant is used as a representative of a client to obtain legal advice. This principle also applies when a solicitor whose advice has been sought by a client requests information from an accountant to prepare a legal opinion. Neither an environmental audit report nor an appraisal prepared at the request of a solicitor in order to enable him to give a legal opinion were held to be privileged, as they were not prepared for the purposes of litigation or in contemplation of litigation.

Weiler v. Canada, [1991] 3 F.C. 617 (F.C.T.D.) - There is a solicitor-client privilege between the lawyers of the Department of Justice and the Government of Canada. The solicitor is the Attorney General of Canada and those who work under her auspices in the Department of Justice. The client is the executive branch of the Government of Canada which includes its various ministries.

Dixon v. Deputy Attorney General of Canada, [1992] 1 C.T.C. 109, 91 D.T.C. 5584 (Ont. S.C.) - Solicitor-client privilege may be claimed prior to a charge being laid or to the commencement of a civil action in the court. However, solicitor-client privilege does not attach to documents exchanged in the advancement of a fraudulent or illegal act or purpose, provided (a) a definite charge or allegation of fraud is made; (b) a *prima facie* case of fraud is made out on the facts; and (c) the respondent discharges the onus of showing a *prima facie* case not by mere allegations of fraud, but by evidence that establishes a *prima facie* case of fraud on the balance of probabilities and not on the basis of mere conjecture.

In interlocutory proceedings, to determine the privileged status of documents seized, it is sufficient for the Crown to show a *prima facie* case of fraud on evidence that takes the case beyond mere conjecture or a simple bald assertion in an affidavit.

A statement of account constitutes a communication by the solicitor to the client that is obviously privileged and is not an accounting record within the meaning of para. 232(1)(e) of the *Income Tax Act*. An account which post-dated the period of the alleged fraud was therefore subject to the protection of the privilege.

Southern Railway of British Columbia Ltd. v. M.N.R., [1991] 1 C.T.C. 432, 91 D.T.C. 5081 (B.C.S.C.) - The petitioners claimed solicitor-client privilege for documents relating to a tax investigation under the *in camera* procedure provided by s. 232 of the *Income Tax Act*. Communications between the petitioners and their lawyers, communications between lawyers and accountants concerning the petitioner's legal affairs, lawyer's bills containing a description of services rendered, and working papers comprised of copies of non-privileged documents with privileged notes on them were all held to be privileged; however, the latter category were said to be non-privileged to the extent they were capable of redaction.

Hartz Can. Inc. v. Colgate-Palmolive Co. (1988), 27 C.P.C. (2d) 152 (Ont. H.C.) - Communications from a U.S. counsel to a U.S. corporation involving a Canadian agreement with implications in both Canada and the U.S. are privileged in an action in Canada.

Brunner & Lay (Can.) Ltd. v. Canada (Deputy Attorney General), [1984] C.T.C. 534, 84 D.T.C. 6514 (F.C.T.D.) -Lawyers' working papers relating to the drafting of minutes for a corporate minute book and inter-office

memoranda between solicitors were found to be privileged.

Secondary Sources: J.L. Perry, *The Income Tax Act, Solicitor-Client Privilege and Solicitor-Client Confidentiality*, (1994), 52 The Advocate 405; F. Bennett, *Confidentiality In A Solicitor and Client Relationship*, (1968), 23 L.Soc. Gaz. 257.

Cross-reference: *Inadvertent Disclosure of Documents*, in this section.

Privilege for Communications with Accountants

M.N.R. v. Kitsch et al, 2003 D.T.C. 5540 (F.C.A.) – The Court of Appeal confirmed that an accountant-client privilege does not exist as a class privilege. The Court also rejected an argument that the tax accountant-client communications at issue were covered by case-by-case privilege under the Wigmore principles.

Tower v. M.N.R., [2003] 4 C.T.C. 263 (F.C.A.) – While a chartered accountant, as a matter of professional ethics, is required to keep his communications with clients confidential, the accountant knows, or ought to know, that this confidentiality is restricted by the power of the Minister to require disclosure. Furthermore, confidentiality was not essential here to the full and satisfactory maintenance of the professional relationship, and the tax accountant-client relationship is not one that in the opinion of the community ought to be sedulously fostered to the degree that it would attract privilege. While confidentiality may be preferred, the tax accountant-client relationship is in no way as fundamental to society and the administration of justice as the solicitor-client relationship.

Baron v. The Queen, [1991] 1 F.C. 688, [1991] 1 C.T.C. 125, 91 D.T.C. 5055 (F.C.A.); appeal dismissed on other grounds [1993] 1 C.T.C. 111 (S.C.C.) - An accountant may, as a matter of professional ethics, be required to keep communications and other information concerning clients confidential; however, accountant-client communications are not privileged because such a privilege is not necessary for the proper administration of justice.

Norwood v. The Queen, [2000] 2 C.T.C. 2900, 2000 D.T.C. 2019 (T.C.C.), appeal allowed in part on other grounds A-220-00, Jan. 12, 2001 (F.C.A.) - The confidential relationship that exists between an accountant and a client is not a privilege and does not override the provisions of the *Income Tax Act*. However, in order to obtain an accountant's interview notes in which the appellant would have a privacy interest, proper procedures under the *Act* must be used by auditors to obtain them.

Long Tractor Inc. v. Canada (1998), 155 D.L.R. (4th) 747, [1998] 8 W.W.R. 641, [1998] 3 C.T.C. 1 (Sask. Q.B.) - Privilege may extend to accountant communications where the accountant is acting as agent or representative of the client for the purpose of seeking, receiving or implementing legal advice from a solicitor, even absent the context of anticipated litigation. The accountant is speaking as agent or representative of the client where he is exercising his expertise on behalf of the client to communicate the complexities of the client's factual situation to the solicitor for the purpose of obtaining legal advice for the client.

Interprovincial Pipe Line Inc. v. M.N.R. (1995), 95 D.T.C. 5642, [1996] 1 F.C. 367, 102 F.T.R. 141 (F.C.T.D.) - A claim of solicitor-client privilege over notes of legal opinions prepared by accountants during the course of an audit was upheld as it was in the course of an audit under the CBCA and any waiver of privilege was limited. Documents provided by the accountants to legal counsel to give advice to the applicants were also privileged as solicitor-client privilege extends to advice provided by professionals retained by counsel in the course of

preparation of legal advice. As well, the applicants were unaware of the disclosure by their accountants, and the accountants had no authority to waive privilege.

Cineplex Odeon Corp. v. Canada (A.G.), [1994] 2 C.T.C. 293, 94 D.T.C. 6407 (Ont. Gen. Div.) - Information or advice given in confidence between accountant and client is not the subject of privilege. The only exception is where information is given to or by the accountant as agent for the client for the purpose of obtaining legal advice for the client. Such information is then the subject of solicitor-client privilege by virtue of the agency.

Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General), [1984] C.T.C. 155, 84 D.T.C. 6177 (Ont. H.C.) - A single letter written to a client from both a law firm and a firm of accountants included legal advice and as it was impossible to tell what portion was attributable to whom, the whole letter was privileged.

Susan Hosiery Ltd. v. M.N.R., [1969] C.T.C. 353, 69 D.T.C. 5278 (Ex. Ct.) - Communications by a taxpayer with an accountant are not privileged from disclosure unless they take place in connection with the request of a lawyer for the purpose of pending or contemplated litigation.

Missiaen v. M.N.R., [1967] C.T.C. 579, 68 D.T.C. 5039 (Alta. S.C.) - Records sent by accountants to a solicitor in answer to an inquiry are not privileged.

Privilege for Accounting Records of a Lawyer

Maranda v. Richer, [2003] 3 S.C.R. 193 – A lawyer's bill of account is *prima facie* privileged.

Nathawad v. M.N.R. (1998), 2001 D.T.C. 5069, 1998 CarswellBC 3223 (B.C.S.C. [In Chambers]) - The judge, on reviewing documents on an application under s. 232 to determine which documents seized from a lawyer's office were privileged, found that statements of accounts or draft statements which contained some description of the services provided, including the amounts billed, were privileged. In this case the judge also saw directions to pay, statements of adjustments, and statements of disbursements of mortgage proceeds which did not contain privileged material. Solicitor-client correspondence requesting the execution of documents or reporting on transactions related to legal services and was privileged.

Burnett v. M.N.R. (1998), [1999] 1 C.T.C. 31, 158 F.T.R. 146 (F.C.T.D.) - A lawyer's cheque requisition falls within the exemption in subsec. 232(1) of the *Income Tax Act* and is not privileged.

Morley v. Revenue Canada, 97 D.T.C. 5264 (N.S.S.C.) - While the legal account rendered by a lawyer is privileged, the clear legislative objective of para. 232(1)(e) of the *Income Tax Act* is that a lawyer's trust account records must be disclosed.

Playfair Developments Ltd. v. Deputy Minister of National Revenue, [1985] 1 C.T.C. 302, 85 D.T.C. 5155 (Ont. H.C.) - Accounting records which show what money was received from a client and what was done with it are not privileged because of s. 232 of the *Income Tax Act*. Inter-office instructions given by solicitors to their accounting department which result in various financial activities are not accounting records or supporting vouchers or cheques and remain privileged. Duplicate cheque requisitions and cheque stubs kept in a lawyer's file are supporting vouchers for accounting records, as are invoices submitted to solicitors for services rendered to them by persons on behalf of the client. Letters to and from a client relating to accounts are not accounting records and remain privileged.

Heath v. Minister of National Revenue, (*sub nom. Heath v. Canada*) [1990] 2 C.T.C. 28, 90 D.T.C. 6009 (B.C.S.C.) - A lawyer's trust ledgers and cheques are part of a lawyer's accounting records and are excluded from privilege by virtue of s. 232 of the *Income Tax Act*.

Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General), [1984] C.T.C. 155, 84 D.T.C. 6177 (Ont. H.C.) - A statement of account from a law firm, seized from the files of the client, was not an accounting record of a lawyer caught by s. 232 of the *Income Tax Act* and so remained privileged. Accounting records of a lawyer would ordinarily be the ledgers of the law firm and its other books of accounts together with the documents preserved in the files of the lawyer which support those entries.

Specified Public Interest-Canada Evidence Act, ss. 37, 39 [See Appendix A of Tax Court Practice©.

Waiver of Privilege

R. v. Stone, [1999] 2 S.C.R. 290, 173 D.L.R. (4th) 66 (S.C.C.) - The act of calling a psychiatrist as a witness would constitute waiver of solicitor-client privilege attached to his report. Once a witness takes the stand, they can no longer be characterized as offering private advice to a party. Rather, they are offering an opinion for the assistance of the court, and the opposing party must be given access to the foundation of the opinion in order to be able to test it adequately.

R. v. Shirose (1999), 133 C.C.C. (3d) 257, [1999] 1 S.C.R. 565 (S.C.C.) - By putting in issue good faith reliance on an undisclosed Department of Justice opinion that a reverse sting was legal, where the good faith argument depended on the content of the legal advice, privilege was waived.

A.M. v. Ryan, [1997] 1 S.C.R. 157 - A failure to list documents in the possession of a third party as privileged in an affidavit of documents was an omission rather than a conscious waiver of privilege. Privilege can only be lost by waiver.

R. v. Desabrais (2000), 149 C.C.C. (3d) 305, 2000 CarswellBC 2118 (B.C.C.A.) - Waiver of privilege must be voluntarily undertaken by the party who enjoys the privilege. Waiver cannot be forced on a party through questions raised by the opposing side on cross-examination. However, in criminal proceedings an application for a stay of proceedings on the grounds of an abuse of process engages the innocence at stake exception to the law of privilege requiring the disclosure of legal opinions to the judge for review.

Bone v. Person (2000), 185 D.L.R. (4th) 335, [2000] 5 W.W.R. 199 (Man. C.A.) - A party to legal proceedings may voluntarily waive solicitor-client privilege on a limited basis, with respect to a particular defined subject matter. However, a reasonable balance must be struck so that the court and the other parties are not misled. The party making disclosure cannot pick and choose between the favourable and the unfavourable. An unrestricted waiver of solicitor-client privilege in criminal proceedings applies to other proceedings dealing with the same subject matter. The doctrine of waiver also applies with equal force to litigation privilege.

Worthington Trucking Inc. v. Klingbeil (Litigation Guardian of) (1999), 43 O.R. (3d) 697, 172 D.L.R. (4th) 761 (Ont. Div. Ct.) - Privilege is waived when the giver of confidential information sues the recipient or otherwise brings into contention the very content of the confidential information.

Stevens v. Canada, [1998] 4 F.C. 89, (1998) 161 D.L.R. (4th) 85, (1998) 228 N.R. 142 (F.C.A.) - The matter of whether there has been a waiver of privilege by the client must be judged according to all of the circumstances.

Begitikong Anishnabe v. Canada (1998), 234 N.R. 24 (F.C.A.) - In the context of a land claim where, under guidelines, the Minister is called on to seek the advice of the Department of Justice, the fact that the Minister, when responding to the claim, wrote that he received legal advice, did not waive privilege.

London Life Insurance Company v. Konney (1998), 41 O.R. (3d) 706, 114 O.A.C. 376 (Ont. Div. Ct.) - Privilege is an important right of a litigant and any waiver of privilege attached to documents because the central issue is the advice within them ought to be confined to what is necessary to satisfy the purpose of limiting the privilege or implying the waiver.

Souter v. 37561 B.C. Ltd. (1995), 15 B.C.L.R. (3d) 213, 130 D.L.R. 81 (C.A.) - The scope of a waiver of solicitor and client privilege is a question of fact. There is no principle to the effect that, once privilege is waived for any reason connected with the litigation, there is a complete loss of that party's privilege.

Rogers, Rogers & Cornwall v. Bank of Montreal, [1985] 4 W.W.R. 508 (B.C.C.A.) - By raising a defence that made its intent and knowledge of the law relevant to the proceedings, the defendant waived its solicitor-client privilege.

Re Chilcott and Clarkson Co. (1984), 48 O.R. (2d) 545, 13 D.L.R. (4th) 481 (Ont. C.A.) - A trustee in bankruptcy was held not to have the legal right to waive solicitor-client privilege on behalf of a bankrupt.
Pitney Bowes of Canada Ltd. v. The Queen, 2003 D.T.C. 5179 (F.C.T.D.) – Common interest privilege applies when parties to a commercial transaction share legal opinions with one another. But the mere existence of a commercial transaction is not sufficient on its own to insulate all shared solicitor-client communications. It is a question of fact whether there is a loss or waiver of privilege which turns on a number of factors including the expectation of the parties and the nature of the disclosure. Parties to some business transactions such as mergers may be adverse in interest; in other commercial transactions the parties will want to negotiate on a shared understanding of each others' legal position and the expectation may be that legal advice provided to one party is for the benefit of and to be shared by all.

Fraser Milner Casgrain LLP v. M.N.R., 2003 D.T.C. 5048 (B.C.S.C.) – Common interest privilege is not limited to situations where there is actual or contemplated litigation. Privilege is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.

Silicate Holdings Ltd. v. The Queen, [2001] 2 C.T.C. 2222, 2001 D.T.C. 299 (T.C.C.) - Just because the Minister, whether on purpose, by inadvertence, or by negligence, wrongfully filed or otherwise provided taxpayer information contrary to s. 241 does not mean that any further information should be released by the Minister. The court has no power to authorize a violation of the law.

Dale v. The Queen, [2000] 4 C.T.C. 184, 2000 D.T.C. 6579 (F.C.T.D.) - A pleading by a party that it acted lawfully did not put the party's state of mind in issue and did not amount to a waiver of solicitor and client privilege.

Almecon Industries Ltd. v. Anchortek Ltd. (1998), [1999] 1 F.C. 507, 164 F.T.R. 90 (F.C.T.D.) - Common interest privilege applies where persons interested in the same litigation exchange information and opinions in anticipation of litigation. This joint privilege cannot be unilaterally waived by one without the express consent of the other.

General Motors Acceptance Corp. of Canada Ltd. v. The Queen, [1999] T.C.J. No. 228, [1999] 3 C.T.C. 2056 (T.C.C.) - Solicitor-client privilege in respect of communications between lawyers of the Department of Justice and Revenue Canada had not been impliedly waived. It could not be said that the legal advice received was raised in the pleadings as the assumptions were clearly pleaded and were not expressed as having been founded upon a legal opinion.

Bentley v. Stone (1998), 42 O.R. (3d) 149, 1998 CarswellOnt 4467 (Ont. Gen. Div.) - The defendant took the position in an affidavit that she did not authorize her solicitor to deliver an offer of settlement. By implication, the defendant waived privilege in respect of the narrow issue as to whether her solicitor had been instructed by her to deliver the offer.

Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd. (1998), 161 D.L.R. (4th) 750, 55 B.C.L.R. (3d) 233 (B.C.S.C.). - Where a solicitor enters the fray and provides evidence in the form of an affidavit his client may be taken to have waived solicitor-client privilege.

Archean Energy Ltd. v. M.N.R., [1998] 1 C.T.C. 398 (Alta. Q.B.) - Communications between the law firm which provided tax advice and other law firms acting for various clients in their corporate capacities remained privileged because the communications were made for the purpose of obtaining instructions and giving common advice to a common client or group of clients. Privilege that one document might have attracted was waived because of its provision by the client to another party. The burden of proving waiver of privilege lies upon the party who alleges it. Providing a legal opinion regarding the tax consequences of a reorganization to a purchaser did not amount to waiver of privilege because the parties to a commercial transaction are not adverse in interest to each other in the same sense as parties to litigation.

United States v. Friedland (1996), 30 O.R.(3d) 568 (Ont. Gen. Div.) - By putting forward an affidavit from its lead counsel as an expert witness on a motion to prove foreign law as a question of fact there was a waiver by implication of solicitor-client privilege by the plaintiff. While privilege could not be claimed over documents reviewed by the lawyer, not just in making the affidavit, but also in forming her opinion, including documents which revealed the plaintiff's legal strategy, privilege remained for legal opinions of Canadian counsel on matters of Canadian law which were not dealt with in the affidavit and internal staff or third party documents received but not reviewed.

Lac La Ronge Indian Band v. Canada, [1996] 10 W.W.R. 625, 147 Sask. R. 257 (Sask. Q.B.) - Solicitor-client privilege is lost if it is waived by the client. The waiver can be explicit, or it can be implied from conduct which demonstrates a clear intention to forgo the privilege. The privilege is held to have been waived in cases where a party has pleaded reliance on legal advice in justification or mitigation. The issue cannot be fairly determined without knowledge of the legal advice which the party received. Where the existence or adequacy of the legal advice is not in itself a basis for the claim or the defence, the privilege is not waived by a simple reference to legal advice in a pleading or disclosed document. The reference to legal advice here did not amount to a waiver. Rather, the defendant merely referred to it as a chronological event.

Transamerica Life Insurance Co. v. Canada Life Assurance Co. (1995), 46 C.P.C. (3d) 110, 27 O.R. (3d) 291 (Ont. Gen. Div.) - The production of one document from a file does not waive the privilege attaching to other documents in the same file. It must be shown that without the additional documents, the document produced is somehow misleading. However, the waiver rule should be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure.

Air Canada v. McDonnell Douglas Corp. (1994), 19 O.R. (3d) 537, 27 C.P.C. (3d) 359 (Master) - In Ontario when there is disclosure of a privileged document the effect is to waive privilege for all purposes.

Zidenburg v. Greenberg (1993), 15 O.R. (3d) 68 (Master) - Where a party puts legal advice, or lack of it, in issue there is a waiver of solicitor-client privilege.

Continental Bank Leasing Corp. v. Canada, [1992] 2 C.T.C. 2587, 92 D.T.C. 2189 (T.C.C.) - The Court concluded that counsel for the respondent, by her affidavit in support of an application to amend the reply to the notice of appeal by withdrawing an admission, did not waive the privilege of the respondent in respect of communications passing between counsel and officials of the Minister.

G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada (1992), 10 C.P.C. (3d) 165 (B.C.S.C.) - While solicitor-client privilege may be waived by implication when a party voluntarily puts the nature of legal advice it received in issue, the privilege is not waived by denying an assertion made by another party that put knowledge which is the subject of a solicitor's advice in issue.

Laxton v. M.N.R., [1989] 2 C.T.C. 2407, 89 D.T.C. 629 (T.C.C.) - There may be an implied waiver of privilege when there is privileged evidence adduced by the party or on behalf of the party entitled to the privilege. However, a solicitor may testify as to facts that are not the subject-matter of privilege without having to answer on privileged communications.

Visser v. M.N.R. (1988), [1989] 1 C.T.C. 192, 89 D.T.C. 5172 (P.E.I. T.D.) - Where the client instructed the solicitor to make a voluntary disclosure of illegal transactions to Revenue, there was a waiver of privilege over all information in the hands of his solicitor necessary to verify the facts in the disclosure.

Hartz Can. Inc. v. Colgate-Palmolive Co. (1988), 27 C.P.C. (2d) 152 (Ont. H.C.) - It is a proper question to ask whether a legal opinion has been obtained but questions beyond that as to the advice given need not be answered where the party being examined has not put that legal advice in issue. At discovery, disclosing facts communicated to a lawyer is not a waiver, but an offer of the lawyer's advice is. Where there is a waiver of privilege in part, fairness and consistency require that the whole privilege be waived.
Columbos v. Carroll (1985), 23 C.P.C. (2d) 177 (Ont. H.C.) - When there is a disclosure of a privileged document to a third party the privilege is waived for all purposes.\

James et al. v. Maloney, [1973] 1 O.R. 656, 1972 CarswellOnt 311 (Ont. H.C.) - Simple mention of a document in a pleading or affidavit does not of itself waive the privilege which might otherwise attend those documents. Waiver depends on the purpose for which the document is mentioned.

Secondary Sources: James E.A. Dolden, "*Waiver of Privilege: The Triumph of Candour Over Confidentiality*" (1990), 36 C.P.C. (2d) 56; Ronald D. Manes and Michael P. Silver, "*Solicitor-Client Privilege in Canadian*

Law", (Toronto: Butterworths, 1993), chap. 5, "*How Privilege is Lost*", at pp. 188-189.

Waiver - Inadvertent Disclosure of Documents

Derby & Co. Ltd. v. Weldon (No. 8), [1991] 1 W.L.R. 73 (C.A.) - Where a privileged document is mistakenly included on a list of documents without claiming privilege, the list may be amended any time before inspection. Once the other party has inspected the privileged document it is too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief. However, if the inspection has been procured by fraud, or if it is obvious on inspection that there has been an obvious mistake, the Court has the power to intervene for the protection of the mistaken party by the grant of an injunction in exercise of an equitable jurisdiction unless there has been inordinate delay. The law should not encourage parties to take advantage of obvious mistakes in the course of discovery. Where a mistake is suspected, the appropriate course is to inquire whether the disclosure was intended.

Guiness Peat Properties Ltd. v. Fitzroy Robinson Partnership, [1987] 2 All E.R. 716 (C.A.) - Although the general rule is that once a document has been inspected it is too late to claim privilege the Court of Appeal found it could, under its equitable jurisdiction, intervene if the inspection had been obtained by fraud or if the inspecting party realized on inspection that it had been permitted to see the document only because of an obvious mistake. Here the party who made the mistake acted promptly in claiming privilege and was entitled to an injunction restraining the other party from using or relying on the letter.

Metcalfe v. Metcalfe (2001), 198 D.L.R. (4th) 318, 153 Man. R. (2d) 207 (C.A. - Through inadvertence on the part of the appellant's solicitor, copies of letters were sent to the respondent's solicitor without any of the solicitor-client privileged portions being blacked out. Inadvertent disclosure of privileged information is not to be considered a waiver because the client who owns the privilege has not intentionally decided to forgo the privilege. Regarding whether the information can nevertheless be used by a third party who has seen the privileged information, which has lost its confidentiality, a court should protect the confidentiality of communications between a solicitor and client as much as possible. Where a third party wishes to introduce such communications into evidence, the court must be satisfied that what is sought to be proved by the communications is important to the outcome of the case and that there is no reasonable alternative form of evidence that can serve the purpose.

Great Atlantic Insurance Co. v. Home Insurance Co., [1981] 2 All E.R. 485 (C.A.) - A deliberate introduction of part of a privileged memorandum into the trial record by mistake waived privilege with regard to the whole document as it was entirely related to one subject matter.

Browne (Litigation Guardian of) v. Lavery (2002), 58 O.R. (3d) 49, 37 C.C.L.I. (3d) 86 (Ont. S.C.J.) - If some of the information in a privileged document is disclosed then the privilege in the entire document is waived.

Elliott v. City of Toronto (2001), 54 O.R. (3d) 472 (Ont. S.C.J.) - Solicitor-client privilege on a report that is prepared for a city council can only be waived by the city council, and not by any one councillor. It is no longer the law of Ontario that a document loses its privilege if it comes into the hands of a third party by any means. The fact that reports came into the hands of newspaper reporters, either inadvertently or surreptitiously, did not constitute a waiver of privilege.

Airst v. Airst (1998), 37 O.R. (3d) 654 (Ont. Gen. Div.) - The traditional common law approach has been that privilege is lost whether disclosure is by accident or by design. However, in the civil context, in cases where the disclosure is found to be inadvertent, more recent authority suggests that a discretion may be exercised in favour of non-disclosure where the release of the documents has been found to be inadvertent. Inadvertent disclosure should not override privilege in all cases. The court may inquire into the circumstances by which the privileged information has come to the attention of the third party. Factors relevant to the court's consideration include the way in which the documents came to be released, whether there was prompt attention to retrieve the documents after the disclosure was discovered, the timing of the discovery of the disclosure, the timing of the application, the number and nature of the third parties who have become aware of the disclosure, whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party, and the impact on the fairness, both actual and perceived, of the processes of the court.

The Promex Group Inc. v. The Queen, [1998] 3 C.T.C. 2128 (T.C.C.) – It may be possible in equity to enjoin the use of privileged information that has illegally or inadvertently come into a party's possession. That is not within the Tax Court's jurisdiction, but it might be open to the appellant to raise privilege with the trial judge.

Cineplex Odeon Corp. v. Canada (A.G.), [1994] 2 C.T.C. 293, 94 D.T.C. 6407 (Ont. Gen. Div.) - The function of audit in an accounting firm is sufficiently different from the function of the tax team in the same firm so that it must be notionally treated as a third party for consideration of waiver of privilege. However, unauthorized and inadvertent placing of documents into the file of the audit team did not result in a waiver of privilege.

Jesionowski v. Gorecki, *(sub nom. Jesionowski v. Wa-Yas (The))* (1992), [1993] 1 F.C. 36, 55 F.T.R. 1 (F.C.T.D.) -An expert's privileged report prepared for settlement purposes lost such status when it was listed in Part I of a Federal Court list of documents and made available.

Double-E Inc. v. Positive Action Tool Western Ltd. (1988), [1989] 1 F.C. 163, 21 F.T.R. 121 (T.D.) - A solicitor's notes attached to a drawing which were inadvertently produced on discovery remained privileged and could not be used. As well, since the notes were opinions of the solicitor they were not facts and not discoverable in any event.

In *Re Brianmore Manufacturing*, [1986] 1 W.L.R. 1430 (Ch. D.) - Until an inspection of the documents on a list of documents has taken place, a list may be corrected by amendment or by notice to the other side that there are documents on it which the litigants refuse to produce. However, once inspection has taken place, secondary evidence of the documents would be admissible so the documents must be produced.

Cross-reference: *Waiver of Solicitor-Client Privilege*, in this paper, at p. 49.

Corporate Documents

83. (1) The court may direct a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged.
(2) The direction under this section may be limited to such documents or classes of documents, or to such of the matters in question as may be specified in it.

Description of Documents

84. 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.

Describing Privileged Documents

Dorchak v. Krupka (1997), 196 A.R. 81 (Alta. C.A.) - The first principle in listing a privileged document is seeing whether one can unequivocally say of a given piece of paper whether its existence has been disclosed in the affidavit. A listing of privileged documents must not give away privileged information so the description of the privileged documents need not include dates, contents or parties to them. A list describing a bundle of consecutively numbered papers is sufficient. Under the rules in Alberta it is not necessary to give details of privileged documents and in Alberta it is wrong to suggest that the description of privileged documents must be sufficient to permit the opponent to assess whether privilege is properly claimed in respect of each document. For example, if the bundle is a lawyer's file it could be called that, without naming the lawyer. However the description cannot be generic and the documents in the bundle must be numbered. The kind of privilege must be segregated and stated for each bundle and if the communications are with a solicitor one must swear that they were for the purpose of getting advice or in contemplation of litigation.

Creaser v. Warren (1987), 36 D.L.R. (4th) 147 (Alta. C.A.) - The description of documents for which privilege is claimed must be sufficient to enable the Court to make a *prima facie* decision whether a likely claim for privilege exists. The description should reveal the nature of the documents to the opposing party, identify the status of the receiver and sender, as well as their relationship to the party and the action, and the basis upon which the claim for privilege is founded.

Visa International v. Block Brothers (1983), 11 C.P.C. (3d) 147 (B.C.C.A.) at 150 per Hinkson J.A.:

> On production of documents in which a claim for privilege is made it is necessary that the documents be sufficiently described so that if the claim is challenged the documents may be considered by a judge in chambers. How and to what extent the documents need be described will depend upon the circumstances.

Canada (Minister of Citizenship and Immigration) v. Dueck (1998), 146 F.T.R. 89, 1998 CarswellNat 559 (F.C.T.D.) - Describing privileged documents as bundles containing "*correspondence, memoranda and other communications passing between officers, servants, or employees of the applicant and their legal advisors*" and as "*documents created or assembled and information acquired by or for the use of the applicant's counsel in the litigation, including investigation reports, briefs, memoranda, translations and working papers*" does not reveal any commonality between the documents in the bundles other than a claim of privilege. The attempt to describe them in bulk does not allow the other party to understand the contents of each bundle. Where privilege is claimed to resist production, a minimum of particulars in respect of the document must be provided to allow the other party to decide whether a challenge is warranted. A proper description would include a brief description, the date, the sender and the recipient.

Bussey v. Can. (A.G.) (1992), 55 F.T.R. 187 (F.C.T.D.) - A description of privileged documents in the following form: "*Reports, opinions and correspondence exchanged between the defendant's solicitors, agents and the RCMP, their agents and representatives on the grounds of solicitor/client privilege*" was inadequate.

Jones v. Stephens (1992), 4 C.P.C. (3d) (B.C.S.C.) - A claim for privilege in an affidavit of documents should sufficiently describe the documents so that the opposing party will not have to speculate as to the precise grounds of the privilege claimed. *Atkin's Encyclopedia of Court Forms in Civil Proceedings* is a useful source of precedent for the forms of claiming privilege. As a general rule a generic cataloguing of privileged documents to enable a party to know when they are produced on an order for production or at trial that they have been disclosed is sufficient. Only in special circumstances are more detailed descriptions of privileged documents required.

Gilbert v. White Pass Transportation (unreported), Doc. No. T-1457-90, (F.C.T.D.), November 27, 1991 - In an affidavit on production sufficient particulars of privileged documents must be provided so that the other party may decide whether there is a *prima facie* case for privilege. A unilateral declaration of privilege goes against the grain of the discovery rules. However the particulars by themselves should not have to disclose what the documents substantially contain. Bundles of documents may be generically identified such as investigators reports, inter-company memoranda, correspondence with solicitors, public documents, otherwise available and correspondence from third parties for the purpose of litigation without disclosing the contents.

Brugge v. British Columbia (Workers' Compensation Board) (1991), 50 C.P.C. (2d) 113 (B.C.S.C.) - Documents for which privilege is claimed must be sufficiently described. In the case of witness statements, it is sufficient to identity the document as such with the date of the statement. It is not necessary to provide the names of the witnesses in order to allow the other party to test the affidavit.

Waxman v. Waxman et al. (1991), 42 C.P.C. 296 (Ont. Master) - Documents over which a claim of privilege is asserted should be listed separately and be dated and described to show whether the document is a letter, an expert's report, an investigator's report, a witness statement or a memorandum of a witness interview and show the function, role and status of the receiver and sender of each document and their relationship to the party to the action, but not particulars that would destroy the benefit of any privilege that might properly attach to the documents such as the name of the witness, expert or author of the report.

Pritchett v. Toronto Dominion Bank (1987), 67 Nfld. & P.E.I.R. 218 (Nfld. S.C.T.D.) - A party providing an affidavit of documents must sufficiently identify documents for which privilege is claimed and there must be an adequate statement of the grounds for the privilege claimed in order to permit the other party to assess whether the claim of privilege is appropriate. In the event that the nature of the documentation is not sufficiently described or where the grounds of privilege are not properly or adequately stated, a party may apply to have the issue determined by the Court. In some instances it may be necessary for the Court to actually inspect the documents to ensure that the claim of privilege is a proper one.

Stamper v. Finnigan (1984), 1 C.P.C. (2d) 175 (N.B.Q.B.) - Under the New Brunswick rules a party claiming privilege in a list of documents must state what privilege is being invoked in relation to a document or bundle of documents and the facts in support of the claim of privilege. If solicitor-client privilege is claimed then the affidavit must establish that the communications were made to obtain legal advice. If it is litigation privilege then the affidavit must establish the dominant purpose for which the documents were prepared.

Grossman et al. v. Toronto General Hospital et al. (1983), 41 O.R. (2d) 457 (H.C.) - Sufficient information must be given of documents for which privilege is claimed to enable a party opposed in interest to be able to identify them without going so far as to give an indirect discovery. Enough must be given to enable a court to make a *prima facie* decision as to whether the claim for privilege has been established from what appears on the face of

the affidavit. A description should include the function, role and status of the receiver and sender of the documents and their relationship to the party, the grounds for the claim of privilege and a description of each document consistent with the law which renders it privileged.

Inspection

85. (1) A party who has delivered a list of documents to any other party shall allow the other party to inspect and copy the documents listed, except those which he objects to produce, and when he delivers the list he shall also deliver a notice stating a place where the documents may be inspected and copied during normal business hours.

(2) Where a party is entitled to inspect the documents to which reference is made in the list of documents, the other party shall, on request and on payment in advance of the cost of reproduction and delivery, deliver copies of any of the documents.

(3) All documents listed in a party's list of documents under section 81 or under section 82 and that are not privileged, and all documents previously produced for inspection by the party shall, without notice, subpoena or direction, be taken to and produced at,

(a) the examination for discovery of the party or a person on behalf of, in place of, or in addition to the party, and

(b) the hearing of the appeal,
unless the parties otherwise agree.

Document in Possession of Non-Party

86. (1) When a document is in the possession of a person not a party to the appeal and the production of such document at a hearing might be compelled, the Court may at the instance of any party, on notice to such person, direct the production of a certified copy which may be used for all purposes in lieu of the original.

(2) Where an application under subsection (1) is in respect of a document in the possession of the Crown, the notice to the Crown shall be directed to, and served on, the Deputy Attorney General of Canada.

Note: While the test for production of documents on full disclosure by a party under Rule 82 is whether they are or have been in a party's possession, custody or power, in Rule 86 reference is only made to documents in the possession of a person not a party to the appeal.

A difference in wording between Rule 82 and the Rules of Ontario, Manitoba, Prince Edward Island and New Brunswick is that the former requires that the production of the document might be compelled at trial while the latter group require that the document be relevant to a material issue and that it would be unfair to require the moving party to proceed to trial without it.

Unlike the Rules of a number of jurisdictions, Rule 86 of the General Procedure Rules does not require that

notice of the application be given to opposing parties.

F. (K.) v. White (2001), 198 D.L.R. (4th) 541, 53 O.R. (3d) 391 (C.A.) - The absence of privilege does not necessarily result in an order for production. A party does not have an unrestricted right to open-ended production of documents in the possession of third parties. *"Fishing expeditions"* are not permitted and orders for production of documents should not be made as a matter of course.

Kaiser v. Canada, [2002] 3 C.T.C. 2033, 2002 D.T.C. 1746 (T.C.C.) - The fact that a different court in different proceedings had made an order concerning possession of the documents being sought from the third party did not affect the power of the Tax Court to make an order under Rule 86.

List Incomplete

87. Where, after the list of documents has been served under either section 81 or section 82, it comes to the attention of the party serving it that the list has for any reason become inaccurate or incomplete, that party shall serve forthwith a supplementary list specifying the inaccuracy or describing the document.

Samson Indian Nation & Band v. Canada (1999), 180 F.T.R. 243, 44 C.P.C. (4th) 265 (F.C.T.D.) - The obligation to provide continuing discovery is not excused because meeting the obligation would be burdensome. The obligation to provide continuing production does not require review of files already reviewed. A deponent of an affidavit of documents which is believed to be complete does not have an obligation to undertake a continuing review or search of the sources originally examined. However, the rules do require production of any document relevant to the issues not previously listed. In the case of the Crown in this large litigation, a monitoring system to ensure production of relevant new documents coming to the attention of a few key representatives in the departments or agencies with operational responsibilities relating to matters raised as issues in the action is sufficient.

Where Affidavit Incomplete or Privilege Improperly Claimed

88. 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.

Use at Hearing

89. (1) Unless the Court otherwise directs, except with the consent in writing of the other party or where discovery of documents has been waived by the other party, no document shall be used in

evidence by a party unless

(a) reference to it appears in the pleadings, or in a list or an affidavit filed and served by a party to the proceeding,

(b) it has been produced by one of the parties, or some person being examined on behalf of one of the parties, at the examination for discovery, or

(c) it has been produced by a witness who is not, in the opinion of the Court, under the control of the party.

(2) Subsection 89(1) does not apply to a document that is used solely as a foundation for or as part of a question in cross-examination or re-examination.

Canadian Imperial Bank of Commerce v. Wicks, (2002) 2 C.P.C. 5th 271 (Ont. Sup. Ct.) – Absent prejudice that cannot be overcome, leave to use a document that has not been disclosed must be granted on terms as are just.

Canadian Economic Consultants Ltd. v. The Queen (2000), [2001] 1 C.T.C. 123, 2000 CarswellNat 2780 (F.C.A.) - The trial judge's exclusion from evidence of documents not mentioned in the appellant's list of documents, which had also been objected to on the grounds of relevance and probative value, was upheld. The court left open the question of whether a document, referred to in a document included in a list of documents, must itself be considered referred to in that list.

Disclosure or Production not Admission of Relevance

90. The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility.

Effect of Failure to Disclose or Produce for Inspection

91. Where a person or party who is required to make discovery of documents under sections 78 to 91 fails or refuses without reasonable excuse to make a list or affidavit of documents or to disclose a document in a list or affidavit of documents or to produce a document for inspection and copying, or to comply with a judgment of the Court in relation to the production or inspection of documents, the Court may,

(a) direct or permit the person or party to make a list or affidavit of documents, or a further list or affidavit of documents,

(b) direct the person or party to produce a document for inspection and copying,

(c) except where the failure or refusal is by a person who is not a party, dismiss the appeal or allow the appeal as the case may be,

(d) direct any party or any other person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the discovery necessitated by

the failure to disclose or produce, and

(e) give such other direction as is just.

Effect of Failure to Disclose or Produce for Inspection

Rule 10 provides that when a notice of motion for a direction under Rule 91 has been filed and served, the person or party against whom the motion is made may not, without the consent of the other party or leave of the Court, remedy any default on the basis of which relief is sought in the motion.

SECTIONS 92-100 EXAMINATION FOR DISCOVERY

General

92. An examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the Court.

Kung v. The Queen (2001), [2002] 1 C.T.C. 2160, 2001 D.T.C. 997 (T.C.C.) - The court does not have the discretion to order the examining party to choose a written discovery instead of an oral discovery. The court declined to order the Crown to pay the appellant's travel costs from Hong Kong to Vancouver as conduct money for attendance at examination for discovery.

Implied Undertaking

See annotations under this heading at Rule 100, *infra.*

Privilege Attaching to Statements on Discovery

Horn Abbot Ltd. v. Reeves (2000), 189 D.L.R. (4th) 644, 47 C.P.C. (4th) 44 (N.S.C.A.) - An action which was based solely upon the discovery evidence given by the defendant in another action was struck out as being in violation of the witness immunity rule.

Who May be Examined

93. (1) A party to a proceeding may examine for discovery an adverse party once, and may examine that party more than once only with leave of the Court.

(2) A party to be examined, other than an individual or the Crown, shall select a knowledgeable officer, director, member or employee, to be examined on behalf of that party, but if the examining party is not satisfied with that person, the examining party may apply to the Court to name some other person.

(3) The Crown, when it is the party to be examined, shall select a knowledgeable officer, servant or employee, nominated by the Deputy Attorney General of Canada, to be examined on behalf of that party, but if the examining party is not satisfied with that person, the examining

party may apply to the Court to name some other person.

(4) Where an officer, director or employee of a corporation or of the Crown has been examined, no other officer, director or employee of the corporation or the Crown may be examined without leave of the Court.

(5) Where an appeal is brought by a party under disability,

(a) the tutor, curator, litigation guardian or committee may be examined in place of the person under disability, or

(b) at the option of the examining party, the person under disability may be examined if that person is competent to give evidence,

but where any person, mentioned in paragraph (a), is a public official, that person may be examined only with leave of the Court.

(6) Where an appeal is brought by an assignee, the assignor may be examined in addition to the assignee.

(7) Where an appeal is brought by a trustee of the estate of a bankrupt, the bankrupt may be examined in addition to the trustee.

(8) Where a party is entitled to examine for discovery,

(a) more than one person under this section, or

(b) multiple parties who are in the same interest,

but the Court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the Court may impose such limits on the right of discovery as are just.

Further Examination With Leave - Rule 93(1)

SmithKline Beecham Animal Health Inc. v. The Queen, 2002 FCA 229 (F.C.A.) - Examination for discovery can be re-opened with leave of the court on a motion under Rule 93(1). However, once discovery has been concluded, further discovery should not be made available where the material counsel wishes to examine was available at the time of the discovery and might, with due diligence, have been put to the opposing party at that time. Discovery must, at some point, come to an end.

Orcheson v. The Queen, 2003 D.T.C. 423 (T.C.C.) – A further examination of another Crown officer can be ordered only after the selected deponent has been examined and there is a basis to conclude that the nominee was not knowledgeable.

When May Examination be Held

94. (1) Subject to subsection (2), a party who seeks to examine an appellant for discovery may serve a notice to attend under section 103 or a list of written questions under section 113 only after the reply has been filed and served and, unless the parties agree otherwise, a list of documents under section 81 has been filed and served.

(2) Where it appears to the Court that it would be just to allow a party to examine an appellant for discovery other than in accordance with subsection (1) it may so direct.

(3) A party who seeks to examine a respondent for discovery may serve a notice to attend under section 103 or written questions under section 113 only after the respondent has delivered a reply or where the time to do so has expired and, unless the parties agree otherwise, the examining party has served a list of documents under section 81.

Examination of Appellant Before Delivering Reply – Rule 94(2)

Kung v. The Queen (2001), [2002] 1 C.T.C. 2160, 2001 D.T.C. 997 (T.C.C.) – Rule 94(2) gives the court discretion to allow a party to examine an appellant for discovery other than in circumstances set out in Rule 94(1), which does not include a discretion to order a written examination over an oral one. In any event, written examination for discovery would be inadequate in circumstances where the appellant's documents were inconsistent.

Scope of Examination

95. (1) A person examined for discovery shall answer, to the best of that person's knowledge, information and belief, any proper question relevant to any matter in issue in the proceeding or to any matter made discoverable by subsection (3) and no question may be objected to on the ground that,

(a) the information sought is evidence or hearsay,

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness, or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined.

(2) Prior to the examination for discovery, the person to be examined shall make all reasonable inquiries regarding the matters in issue from all of the party's officers, servants, agents and employees, past or present, either within or outside Canada and, if necessary, the person being examined for discovery may be required to become better informed and for that purpose the examination may be adjourned.

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the proceeding including the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relating to any matter in issue in

the appeal were made or formed in preparation for contemplated or pending litigation and for no other purpose, and

(b) the party being examined undertakes not to call the expert as a witness at the hearing.

(4) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the proceeding, unless the Court orders otherwise. [SOR/93-96, s. 13.]

Note: The Rule speaks of the disclosure of the findings, opinions and conclusions of the expert; it does not mention disclosure of the report.

Scope of Examination

SmithKline Beecham Animal Health Inc. v. The Queen, 2002 FCA 229 (F.C.A.) - The *"train of inquiry"* test for documents has been adopted by the Court of Appeal. Under this test, a document can properly be said to contain information that may enable a party to advance its case, or to damage the case of its adversary, if it is a document that may fairly lead to a train of inquiry that may have either of these consequences. The statement that an examining party may seek information and admissions which will assist it, not only to defeat its opponent's case, but also to advance the case which it seeks to put forward, is substantially the same as the "train of inquiry" test and is correct.

Jurchison v. The Queen, [2001] 3 C.T.C. 33, 2001 D.T.C. 5301 (F.C.A.) - The right to discovery should not be lightly extinguished. Where it is alleged that questions on discovery could have their genesis in evidence taken in a breach of a taxpayer's Charter rights it is preferable to allow the discovery to proceed with the taxpayer being given the right to object to any such questions.

Gienow Building Products Ltd. v. Tremco Inc. (2000), 186 D.L.R. (4th) 730, 42 C.P.C. (4th) 1 (Alta. C.A.) - A former employee of a party may be examined for discovery about information that is relevant to the litigation although the knowledge was acquired after the employment ended.

SmithKline Beecham Animal Health Inc. v. The Queen, [2001] 2 C.T.C. 2086, 2001 D.T.C. 192 (T.C.C.), appeal dismissed on other grounds 2002 FCA 229 (F.C.A.) - Bonner T.C.C.J. agreed with the analysis of compendious or reliance questions asked on discovery set out in the Federal Court decision in *Montana Band v. Canada*. The proper approach is to be flexible. While it is not proper to ask a witness what evidence the witness has to support an allegation, it is proper to ask what facts are known which underlie a particular allegation in the pleading. As well, a question about the risks and rates of return of other pharmaceutical companies was not proper where there was no allegation in the pleadings about the conduct of other taxpayers and no response had raised the issue. A particularly clear demonstration of relevance is required where a taxpayer asks a Revenue official on discovery for information which a competitor has furnished Revenue in accordance with the requirements of the *Income Tax Act*. Except in cases where the Minister has relied on information garnered from other taxpayers there are few, if any, circumstances in which information provided to the Minister by taxpayers other than the appellant will be relevant in a tax appeal. A party is not required to segregate the documents that have been produced and to identify for the benefit of the opposite party those documents that relate to a particular issue. That is seeking the work product of counsel

and goes beyond the ambit of Rule 82. A party is not entitled to an expression of the opinion of counsel for the opposing party regarding the use that may legitimately be made of the documents produced.

Baxter v. The Queen, [2005] 1 C.T.C. 2001 (T.C.C.) – Relevancy is defined by the pleadings. The threshold level of relevancy is quite low and wide latitude should be given. Counsel should not be inhibited in asking questions because the question, standing alone, may seem irrelevant.

Silicate Holdings Ltd. v. The Queen, [2001] 2 C.T.C. 2222, 2001 D.T.C. 299 (T.C.C.) - Doubts expressed by officials as to the success of the litigation do not affect the question as to whether an assessment should be made. What is relevant are the facts the Minister considered in assessing and not the Minister's mental processes or the reasons why the assessment occurred.

Harris v. The Queen, [2001] 3 C.T.C. 18, 2001 D.T.C. 5322 (F.C.T.D.) - The term *"fishing expedition"* has generally been used to describe an indiscriminate request for production in the hope of uncovering helpful information. The notion is to be weighed in terms of the reasonableness of the application for disclosure.

Discovery of and About Experts – Rule 95(3)

GLP NT Corp v. The Queen, 2004 TCC 738 (T.C.C.) – A party is not required to provide notes taken by, documents provided to, or draft reports of an expert at discovery. But once the expert is called as a witness the party calling him waives any privilege that previously protected the expert's papers from production.

Browne (Litigation Guardian of) v. Lavery (2002), 58 O.R. (3d) 49, 37 C.C.L.I. (3d) 86 (Ont. S.C.J.) - An expert report from one expert that is sent to another expert who is going to be called at trial must be produced on discovery. While acknowledging opposing views, this judge held that it is no longer appropriate to restrict the word *"findings"* to information on which the expert actually relied. Production should be ordered even if it involves disclosure of information such as statements of the client, which would otherwise be subject to solicitor-and-client privilege. Although making it clear that it was outside the issues before the court, the judge expressed the opinion that all communications that take place between counsel and an expert before the completion of a report of an expert whose opinion is going to be used at trial must be produced.

Effect of Refusal

96. (1) Where a party, or a person examined for discovery on behalf or in place of a party, has refused to answer a proper question or to answer a question on the ground of privilege, and has failed to furnish the information in writing not later than ten days after the proceeding is set down for hearing, the party may not introduce at the hearing the information refused on discovery, except with leave of the judge.

(2) The sanction provided by subsection (1) is in addition to the sanctions provided by section 110.

Note: Rule 110 provides sanctions for default or misconduct by a person to be examined.

Effect of Counsel Answering

97. Questions on an oral examination for discovery shall be answered by the person being examined

but, where there is no objection, the question may be answered by counsel and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.

Information Subsequently Obtained

98. (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,

(a) was incorrect or incomplete when made, or

(b) is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party.

(2) Where a party provides information in writing under subsection (1),

(a) the adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery, and

(b) the writing may be treated at a hearing as if it formed part of the original examination of the person examined.

(3) Where a party has failed to comply with subsection (1) or a requirement under paragraph (2)(a), and the information subsequently discovered is,

(a) favourable to that party's case, the party may not introduce the information at the hearing, except with leave of the judge, or

(b) not favourable to that party's case, the Court may give such direction as is just.

Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (2000), 51 O.R. (3d) 97, 138 O.A.C. 201 (O.C.A.), leave to appeal refused 2001 CarswellOnt 3412 (S.C.C.) - An admission on discovery is an informal rather than a formal admission which does not require leave of the court to withdraw and can be contradicted by other evidence. In general, parties are intended to correct their discovery answers but the trial judge is entitled to examine both the original and amended answers to decide on the impact of the correction. If the correction and new evidence changes the nature of the case that has to be met and is not brought to the attention of the adverse party forthwith and before trial, leave to correct the answer and introduce the new evidence may be denied.

Discovery of Non-Parties with Leave

99. (1) The Court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the appeal, other than an expert engaged by or on behalf of a party in

preparation for contemplated or pending litigation.

(2) Leave under subsection (1) shall not be granted unless the Court is satisfied that,

(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person sought to be examined,

(b) it would be unfair to require the moving party to proceed to hearing without having the opportunity of examining the person, and

(c) the examination will not,

(i) unduly delay the commencement of the hearing of the proceeding,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person the moving party seeks to examine.

(3) A party who examines a person orally under this section shall, if requested, serve any party who attended or was represented on the examination with the transcript free of charge, unless the Court directs otherwise.

(4) The examining party is not entitled to recover the costs of the examination from another party unless the Court expressly directs otherwise.

(5) The evidence of a person examined under this section may not be read into evidence at the hearing under subsection 100(1).

Discovery of Non-Parties with Leave

Bosa Development Corp. v. The Queen, [2001] 3 C.T.C. 2030, 2001 D.T.C. 432 (T.C.C.) - It is a prerequisite to an order granting discovery of a non-party that the party seeking the discovery have inquired of the non-party for the information it wishes to obtain.

Use of Examination for Discovery at Hearing

100. (1) At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of [SOR/96-503, s. 2]

(a) the adverse party, or

(b) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,

if the evidence is otherwise admissible, whether the party or person has already given evidence or not.

(1.1) The judge may, on request, allow the part of evidence referred to in subsection (1) to be read into evidence at a time other than that specified in that subsection. [SOR/96-503, s. 2]

(2) Subject to the provisions of the *Canada Evidence Act*, the evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

(3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

(3.1) A party who seeks to read into evidence under subsection (1) or who requests the judge to direct the introduction of evidence under subsection (3) may, with leave of the judge, instead of reading into evidence, file with the Court a photocopy or other copy of the relevant extracts from the transcripts of the examination for discovery, and when the copy is filed such extracts shall form part of the record. [SOR/96-503, s. 2]

(4) A party who reads into evidence as part of that party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf of or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence.

(5) The evidence given on the examination for discovery of a party under disability may be read into or used in evidence at the hearing only with leave of the judge.

(6) Where a person examined for discovery,

(a) has died,

(b) is unable to testify because of infirmity or illness,
(c) for any other sufficient reason cannot be compelled to attend at the hearing, or

(d) refuses to take an oath or make an affirmation or to answer any proper question,

any party may, with leave of the judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in Court.

(7) In deciding whether to grant leave under subsection (6), the judge shall consider,

(a) the extent to which the person was cross-examined on the examination for discovery,

(b) the importance of the evidence in the proceeding,

(b) the general principle that evidence should be presented orally in Court, and

(d) any other relevant factor.

(8) Where an appeal has been discontinued or dismissed and another appeal involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former appeal may be read into or used in evidence at the hearing of the subsequent appeal as if it had been taken in the subsequent appeal.

Practice Note: The Court has issued a Practice Note (see the Practice Note Tab in *Tax Court Practice©*) requiring a party who intends to read in from the discovery to serve written notice identifying the passages to be read in on the adverse party no later than 4 days before the hearing. If the adverse party intends to request that other passages which qualify or explain the evidence be read in, then the adverse party shall serve written notice on the other parties no later than 2 days before the hearing.

Use of Examination for Discovery at Hearing

Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham (2000), 51 O.R. (3d) 97, 138 O.A.C. 201 (O.C.A.), leave to appeal refused 2001 CarswellOnt 3412 (S.C.C.) - A party reading in from the discovery of the adverse party is not precluded from contradicting that discovery evidence on cross-examination.

Use of Examination for Discovery at Hearing - Withdrawal of Admissions

Archambault v. The Queen (1998), [2000] 4 C.T.C. 47, 98 D.T.C. 6323 (Fr.) (F.C.T.D.), appeal dismissed (2000), [2001] 1 C.T.C. 35, 2000 D.T.C. 6316 (Fr.) (F.C.A.) - Permission to withdraw admissions made at examination for discovery was denied by the court as they were made ten years before trial and their withdrawal would have caused serious prejudice to the other party. Admissions made by counsel for a party cannot be withdrawn simply because the party denies expressly authorizing his representative to make them.

Implied Undertaking

Lac d'Amiante du Canada Ltée v. 2858-0702 Quebec Inc., 2001 SCC 51 - The implied obligation of confidentiality that applies to an examination for discovery applies during the case to both a party and a party's representatives and remains applicable after the trial ends. The court has the power to relieve persons of the obligation of confidentiality in cases where it is necessary to do so, in the interests of justice, however courts apply a balancing of interests tests and will avoid exercising that power too routinely. Before using information covered by the implied undertaking, the applicant must specify the use to which the information will be put and the party who provided the information must be given an opportunity to oppose the application. One example of where disclosure of all or part of an examination may be approved is where a party wishes to establish in another trial that a witness has given inconsistent versions of the same fact. The rule of confidentiality will apply to information obtained solely from the examination and not to information that is available from other sources.

Edgeworth Construction Ltd. v. Thurber Consultants Ltd., [2000] 8 W.W.R. 519, 78 B.C.L.R. (3d) 200 (C.A.), leave to appeal refused 2001 CarswellBC 678 (S.C.C.) - There is an obligation not to use discovery documents for purposes other than in connection with the ligitation in which they were produced. The court would not create an exception for circumstances in which the defendant was represented by the same counsel as another defendant in a different action brought by the plaintiff. Rather than endorsing a procedural *"short cut"*, i.e., the defendant argued that it could have simply obtained the same information from the plaintiff again in the second action, the court stated that its consent should have been sought.

Livent Inc. v. Drabinsky (2001), 53 O.R. (3d) 126, 2001 CarswellOnt 717 (S.C.J. [Commercial List]) - The court said that even if the common law right in non-parties to seek relief from the implied undertaking rule has been incorporated into the Ontario rules, the burden is heavy and relief will not readily be granted.

Andersen Consulting v. The Queen, [2001] 2 F.C. 324, 2001 CarswellNat 104 (F.C.T.D.) - Under the implied undertaking doctrine, all information obtained in the process of discovery in a civil action is only to be used by the party to whom it is given for the purposes of the action and is not to be disclosed or otherwise made use of unless and until it is produced in evidence and becomes part of the public record. Since the undertaking is given to the court, it may be enforced by the court through the use of the contempt power. As a matter of practice, it usually includes an obligation on the part of the receiving party to return or destroy the documents, which have not become part of the public record, at the conclusion of the litigation.

Kirkbi AG v. Ritvik Holdings Inc. (2000), [2001] 1 F.C. 681, 10 C.P.R. (4th) 531 (F.C.T.D.) - Although a party gains possession of a document through discovery, if it were possible to obtain it through other legitimate means, the implied undertaking rule does not apply, as the document could not be construed as private. Where the documents were publicly available in court registries, but the defendant was unable to obtain them as copies had been destroyed, the court ordered that the documents did not fall under the protection of the implied undertaking rule.

Mark Anthony Properties Ltd. v. Victor International Inc. (2000), 183 F.T.R. 40, 2000 CarswellNat 268 (F.C.T.D.) - An implied undertaking arises automatically to protect information disclosed in the discovery process except for information that becomes part of the public record in the proceeding or information that could also have been obtained from a source other than discovery. The implied undertaking arises whether or not the parties have entered into a confidentiality order. Proceedings are often settled on the basis of information disclosed under a confidentiality order without discoveries ever being held, so the inclusion of a provision in a confidentiality order governing the subsequent use that may be made of confidential information may be necessary.

SECTIONS 101-112 EXAMINATIONS OUT OF COURT

Application of Sections 102 to 112

101. Sections 102 to 112 apply to all oral examinations for which provision is made in these rules including,

(a) an oral examination for discovery,

(b) the taking of evidence before hearing,

(c) the cross-examination on an affidavit, and

(d) the examination out of Court of a witness before hearing of a pending motion.

Mode of Examination

102. (1) An oral examination shall be held before a person agreed upon by the parties, who may be the verbatim reporter, or some other person if directed by the Court.

(2) Unless otherwise directed by the Court or the parties otherwise agree, an examination that takes place in Canada shall be under oath or upon affirmation as provided in the *Canada Evidence Act*.

(3) Unless otherwise directed by the Court, or the parties otherwise agree, an examination shall be recorded by a verbatim reporter and arrangements for the attendance of a reporter shall be made by the party conducting the examination, who shall pay the reporter's fees.

(4) Where the person being examined understands neither English nor French, or is deaf or mute, the examining party shall provide and pay the fees and disbursements of a competent and independent interpreter approved by the Registrar who shall take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation, the questions to be put to the person being examined and the person's answers.

(5) Where the examination is to be conducted in one of the official languages and the person to be examined would prefer to be examined in the other official language, the examining party shall advise the Registrar, and the Registrar shall then appoint an interpreter, at no cost to the parties, who shall take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation and the questions to be put to the person being examined and the person's answers.

(6) The transcript of the examination shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined.

Manner of Requiring Attendance

103. (1) Where the person to be examined is a party to the proceeding, a notice to attend shall be served (Form 103(1)),

(a) on the party's counsel of record, or

(b) where the party acts in person, on the party, personally and not by an alternative to personal service.

(2) Where a person is to be examined on behalf or in place of a party, a notice to attend shall be served,

(a) on the party's counsel of record, or

(b) on the person to be examined, personally and not by an alternative to personal service.

(3) Where a person is to be cross-examined on an affidavit, a notice to attend shall be served,

(a) on the counsel for the party who filed the affidavit, or

(b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service.

(4) Where the person to be examined,

(a) is neither a party nor a person referred to in subsection (2) or (3), and

(b) resides in Canada,

the person shall be served with a subpoena personally and not by an alternative to personal service and the provisions of section 141 apply with such modifications as are necessary. (Form 103(4))

(5) When a subpoena is served on a person, witness fees and expenses calculated in accordance with Schedule II, Tariff A, shall be paid or tendered to the witness at the same time.

(6) Section 142 (compelling attendance of witness in custody) applies to the securing of the attendance for examination of a person in custody.

Notice of Time and Place

104. The person to be examined shall be given not less than ten days notice of the time and place of the examination, unless the Court directs otherwise.

Production of Documents on Examination

105. (1) Unless the parties otherwise agree, or the Court otherwise directs, the person to be examined shall bring to the examination and produce for inspection,

(a) on an examination for discovery, all documents as required by subsection 85(3), and
(b) on all other examinations, such documents as may be required by subsection 105(3).

(2) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that relates to a matter in issue in the proceeding and that is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within ten days thereafter, unless the Court directs otherwise.

(3) The notice to attend for examination or subpoena may require the person to be examined to bring to the examination and produce for inspection,

(a) all documents and things relating to any matter in issue in the proceeding that are in that person's possession, control or power and that are not privileged, or

(b) such documents or things described in paragraph (a) as are specified in the notice or subpoena,

unless the Court directs otherwise.

Note: This Rule requires the party to be examined to attend with all documents listed in the party's list of documents without notice or demand. Where the list of documents has been filed pursuant to Rule 81 the disclosure will have only been partial. But, the examining party may require the deponent to bring to an examination all documents relating to any matter in issue in the proceeding that are in that person's possession, control or power that are not privileged.

Re-Examination

106. (1) A person being examined for discovery may be re-examined by his or her own counsel.

(2) A person being cross-examined on his or her affidavit may be re-examined by his or her own counsel.

(3) The re-examination shall take place immediately after the examination or cross-examination and shall not take the form of a cross-examination.

Note: This Rule also applies to the taking of evidence before hearing. The Ontario, Manitoba and Prince Edward Island Rules provide that in these circumstances re-examination may take the form of cross-examination.

Objections and Rulings

107. (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the Court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the Court.

Baxter v. The Queen, [2005] 1 C.T.C. 2001 (T.C.C.) – On a motion to compel answers to discovery questions (a) relevancy on discovery must be broadly and liberally construed and wide latitude should be given; (b) a motions judge should not second guess the discretion of counsel by examining minutely each question or asking counsel for the party being examined to justify each question or explain its relevancy; (c) the motions judge should not

seek to impose his or her views of relevancy on the judge who hears the case by excluding questions that he or she may consider irrelevant but which, in the context of the evidence as a whole, the trial judge may consider relevant; and (d) patently irrelevant or abusive questions or questions designed to embarrass or harass the witness or delay the case should not be permitted.

Note: Also see the case annotations following Rules 78 to 91 regarding objections that may be taken to the production of documents.

Improper Conduct of Examination

108. (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

(a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections,

(b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined,

(c) many of the answers to the questions are evasive, unresponsive or unduly lengthy, or

(d) there has been a neglect or improper refusal to produce a relevant document on the examination.

(2) Where the Court finds that,

(a) a person's improper conduct necessitated a motion under subsection (1), or[

(b) a person improperly adjourned an examination under subsection (1),[

the Court may direct the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the Court may fix the costs and give such other direction as is just.

Videotaping or other Recording of Examination

109. (1) On consent of the parties or by direction of the Court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the Court along with the transcript.

(2) Section 111 applies, with necessary modifications, to a tape or other recording made under subsection (1).

Sanctions for Default or Misconduct by Person to be Examined

110. Where a person fails to attend at the time and place fixed for an examination in the notice to attend or subpoena, or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that that person is required to produce or to comply with a direction under section 108, the Court may,

(a) where an objection to a question is held to be improper, direct or permit the person being examined to reattend at that person's own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer,

(b) where the person is a party or, on an examination for discovery, a person examined on behalf of or in place of a party, dismiss the appeal or allow the appeal as the case may be,

(c) strike out all or part of the person's evidence, including any affidavit made by the person, and

(d) direct any party or any other person to pay personally and forthwith costs of the motion, any costs thrown away and the costs of any continuation of the examination.

Jules Fafard v. The Queen (1999), [2000] 2 C.T.C. 362, 2000 D.T.C. 6309 (Eng.), 99 D.T.C. 5829 (F.C.A.) - The taxpayer's appeal was dismissed under Rule 110 because of his verbal and physical misconduct and his refusal to answer proper questions.

Sykes v. The Queen, [2001] 4 C.T.C. 2815, 2001 D.T.C. 920 (T.C.C.) - The court ordered that the appellant could not present certain documents or testimony at his appeal given his failure to comply with court orders.

Filing of Transcript

111. (1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the Court.

(2) A copy of a transcript for the use of the Court at hearing shall not be filed until a party refers to it at hearing, and the presiding judge may read only the portions to which a party refers.

Note: Under the similar Ontario and Prince Edward Island Rules a transcript to be used on a motion or application shall be filed before the hearing.

Examination Where Person Outside Canada

112. (1) Where the person to be examined resides outside of Canada the Court may determine,

(a) whether the examination is to take place in or outside of Canada,

(b) the time and place of the examination,

(c) the minimum notice period,

(d) the amount of witness fees and expenses to be paid to the person to be examined, and

(e) any other matter respecting the holding of the examination.

(2) Where the person is to be examined outside of Canada, the direction under subsection (1) shall, if the moving party requests it, provide for the issuing of,

(a) a commission (Form 112(2)(a)) authorizing the taking of evidence before a named commissioner, and

(b) a letter of request (Form 112(2)(b)-REQUEST) directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined before the commissioner, and the direction shall be in Form 112(2)(b)A—DIRECTION.

(3) The commission and letter of request shall be prepared and issued by the Registrar.

(4) Where the person to be examined resides outside of Canada and is not a party or a person to be examined on behalf of or in place of a party, the examining party shall pay or tender to the person to be examined the amount of witness fees and expenses fixed under subsection (1).

(5) A commissioner shall, to the extent that it is possible to do so, conduct the examination in the form of oral questions and answers in accordance with these rules, the laws of evidence of Canada and the terms of the commission, unless some other form of examination is required by the judgment or the law of the place where the examination is conducted.

(6) As soon as the transcript of the examination is prepared the commissioner shall,

(a) return the commission, together with the original transcript and exhibits, to the Registrar who issued it,

(b) keep a copy of the transcript and, where practicable, the exhibits, and

(c) notify the parties who appeared at the examination that the transcript is complete and has been returned to the Registrar who issued the commission.

(7) The Registrar shall send the transcript to the counsel for the examining party and the counsel shall, if requested, forthwith serve every other party with the transcript free of charge.

Note: See also Part IV, "*Evidence to be Obtained Outside Canada*", *International Judicial Co-Operation in Civil, Commercial, Administrative and Criminal Matters*, (1980) Dept. of External Affairs - Government of Canada.

SECTIONS 113-118 PROCEDURE ON EXAMINATION FOR DISCOVERY BY WRITTEN QUESTIONS

Questions

113. An examination for discovery by written questions and answers shall be conducted by serving a list of the questions to be answered on the person to be examined. (Form 113)

Note: Rule 92 provides that an examination may take the form of an examination by written questions and answers at the option of the examining party, but that the examining party may not conduct both an oral examination and an examination by written questions and answers, except with leave of the Court. Section 17.3 of the *Tax Court of Canada Act* imposes monetary thresholds on when an oral examination may be held; the restrictions do not apply to an examination under these sections.

Kung v. The Queen (2001), [2002] 1 C.T.C. 2160, 2001 D.T.C. 997 (T.C.C.) - The court does not have a discretion to order a written examination over an oral one. In any event, written examination for discovery would be inadequate in circumstances where the appellant listed 125 documents in his list of documents, some of which conflicted with other materials.

Answers

114. Written questions shall be answered by the affidavit of the person being examined, served on the examining party within thirty days after service of the list of questions. (Form 114)

Objections

115. An objection to answering a written question shall be made in the affidavit of the person being examined, with a brief statement of the reason for the objection.

Failure to Answer

116. (1) Where the examining party is not satisfied with an answer or where an answer suggests a new line of questioning, the examining party may, within fifteen days after receiving the answer, serve a further list of written questions which shall be answered within thirty days after service.

(2) Where the person being examined refuses or fails to answer a proper question or where the answer to a question is insufficient, the Court may direct the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination.

(3) Where the Court is satisfied, on reading all the answers to the written questions, that some or all of them are evasive, unresponsive or otherwise unsatisfactory, the Court may direct the person examined to submit to oral examination on such terms respecting costs and other matters as are just.

(4) Where a person refuses or fails to answer a proper question on a written examination or to produce a document which that person is required to produce, the Court may, in addition to imposing the sanctions provided in subsections (2) and (3),

(a) if the person is a party or a person examined on behalf of or in place of a party,

dismiss the appeal or allow the appeal as the case may be,

(b) strike out all or part of the person's evidence, and

(c) give such other direction as is just.

Cimolai v. The Queen, 2005 TCC 93 (T.C.C.) – Rule 116(1) is not intended to allow a further list of written questions *ad infinitum*. A party gets to examine an adverse party only once and Rule 116(1) must be applied so as not to abuse this governing principle, subject to Rule 93(1) which provides for leave for further examinations.
Tremblay v. The Queen, 2003 D.T.C. 1367 (T.C.C.) – A motion to dismiss an appeal for failure to respond to questions on a written examination was allowed. The appellant had not answered the questions and by denying the existence of proven facts and by his conduct on the motion demonstrated that he had not intention of preparing for the conduct of a reasonable hearing.

Improper Conduct of Written Examination

117. On motion by the person being examined, or by any party, the Court may terminate the written examination or limit its scope where,

(a) the right to examine is being abused by an excess of improper questions, or

(b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined.

Filing Questions and Answers

118. Section 111 applies, with necessary modifications, to the filing of written questions and answers for the use of the Court.

GENERAL PROCEDURE FORMS
SCHEDULE I

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FORM 21(1)(a)

NOTICE OF APPEAL—GENERAL PROCEDURE

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

NOTICE OF APPEAL

(a) **In the case of an individual state home address in full and in the case of a corporation state address in full of principal place of business in the province in which the appeal is being instituted,**

(b) **Identify the assessment(s) under appeal: include date of assessment(s) and if the appeal is under the *Income Tax Act* include taxation year(s) or if the appeal is under the *Excise Tax Act* include the period to which the assessment(s) relate(s),**

(c) **Relate the material facts relied on,**

(d) **Specify the issues to be decided,**

(e) **Refer to the statutory provisions relied on,**

(f) **Set forth the reasons the appellant intends to rely on,**

(g) **Indicate the relief sought, and**

(h) **Date of notice.**

____
(Signature)

Address for service, telephone number, fax number,
if any, of appellant's counsel or, if appellant appearing
in person, state telephone number.

FORM 45

ANSWER

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ANSWER

1. **The appellant admits the allegations contained in paragraphs . . . . of the reply to the notice of appeal.**
2. **The appellant denies the allegations contained in paragraphs . . . . of the reply to the notice of appeal.**
3. **The appellant has no knowledge in respect of the allegations contained in paragraphs . . . . of the reply to the notice of appeal.**
4. **(Set out in separate, consecutively numbered paragraphs each allegation of material fact relied on by way of answer to the reply to the notice of appeal.)**

Date:

____
(Signature)

(Name, address and telephone number of appellant's counsel or appellant)

TO: **(Name and address of respondent's counsel)**

FORM 81

LIST OF DOCUMENTS
(PARTIAL DISCLOSURE)

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

LIST OF DOCUMENTS
(PARTIAL DISCLOSURE)

The following is a list of the documents of which the appellant (or respondent) has knowledge that might be used in evidence:

(a) to establish or to assist in establishing any allegation of fact in any pleading filed herein by the said party, or

(b) to rebut or assist in rebutting any allegation of fact in any pleading filed herein by any other party, and which is filed and served in compliance with section 81.

SCHEDULE A

Documents in the possession, control or power of the party. (Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it.)

SCHEDULE B

Documents of which the party has knowledge but which are not in the party's possession, control or power. (Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it. Give the present location of each document.)

Date:

____
(Signature)
(of party, or of an officer, director or employee of the party, or of the counsel of record of the party)

TAKE NOTICE that the documents referred to in Schedule A above may be inspected and copies taken at (place) on (date) between the hours of (time).

FORM 82(3)

LIST OF DOCUMENTS
(FULL DISCLOSURE)

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

LIST OF DOCUMENTS
(FULL DISCLOSURE)

The following is a list of all the documents which are or have been in the appellant's (or respondent's) possession, control or power relevant to any matter in question between or among them in the appeal and which is filed and served in compliance with section 82. [SOR/93-96, s. 17; SOR/2008-303, s.25.]

SCHEDULE A

Documents in the possession, control or power of the party that the party does not object to producing for inspection. (Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it).

SCHEDULE B

Documents that are or were in the possession, control or power of the party that the party objects to producing on the grounds that

> **(State ground of objection. Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it.)**

SCHEDULE C

Documents that were formerly in the possession, control or power of the party, but are no longer in the party's possession, control or power. (Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it. State when and how possession or control of or power over each document was lost, and give the present location of each document.)

(Continued)

FORM 82(3)—*(Continued)*

Date:

____
(Signature)
(of party, or of an officer, director or employee of the party, or of the counsel of record of the party)

TAKE NOTICE that the documents referred to in Schedule A above may be inspected and copies taken at (place) on (date) between the hours of (time).

FORM 82(4)A

AFFIDAVIT OF DOCUMENTS

(INDIVIDUAL)

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AFFIDAVIT OF DOCUMENTS

I, (full name of deponent), of the (City, Town, etc.) of . . . ., in the (Province, Territory, etc.) of . . . ., the appellant (or as may be) in this action, MAKE OATH AND SAY (or AFFIRM):

1. **I have conducted a diligent search of my records and have made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relevant to any matter in question in this proceeding that are or have been in my possession, control or power.**

2. **Now shown to me and marked Exhibit "A" to this affidavit is a list of documents.**

3. **I have listed in Schedule A those documents that are in my possession, control or power and that I do not object to producing for inspection.**

4. **I have listed in Schedule B those documents that are or were in my possession, control or power and that I object to producing because I claim they are privileged, and I have stated in Schedule B the grounds for each such claim.**

FORM 82(4)A—*(Continued)*

5. **I have listed in Schedule C those documents that were formerly in my possession, control or power but are no longer in my possession, control or power, and I have stated in Schedule C when and how I lost possession or control of or power over them and their present location.**

6. **I have never had in my possession, control or power any document relating to any matter in question in this proceeding other than those listed in Schedules A, B and C.**

SWORN (etc.)

____
(Signature of deponent)

FORM 82(4)B

AFFIDAVIT OF DOCUMENTS

(CORPORATION OR DEPARTMENT OF NATIONAL REVENUE)

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AFFIDAVIT OF DOCUMENTS

I, (full name of deponent), of the (City, Town, etc.) of . . . ., in the (Province, Territory, etc.) of . . . ., MAKE OATH AND SAY (or AFFIRM):

1. **I am the (state the position held by the deponent in the corporation or Department of National Revenue) of the appellant (or as may be) in this action.**

2. **Now shown to me and marked Exhibit “A” to this affidavit is a list of documents.**

3. **I have conducted a diligent search of the corporation's (or Department of National Revenue's) records and made appropriate enquiries of others to inform myself in order to make this affidavit. This affidavit discloses, to the full extent of my knowledge, information and belief, all documents relevant to any matter in question in this action that are or have been in the possession, control or power of the corporation (or Department of National Revenue).**

4. **I have listed in Schedule A those documents that are in the possession, control or power of the corporation (or Department of National Revenue) and that it (or the Minister) does not object to producing for inspection.**

(Continued)

FORM 82(4)B—*(Continued)*

5. **I have listed in Schedule B those documents that are or were in the possession, control or power of the corporation (or Department of National Revenue) and that it (or the Minister) objects to producing because they are privileged, and I have stated in Schedule B the grounds for each such claim.**

6. **I have listed in Schedule C those documents that were formerly in the possession, control or power of the corporation (or Department of National Revenue) but are no longer in its possession, control or power and I have stated in Schedule C when and how it lost possession or control of or power over them and their present location.**

7. **The corporation (or Department of National Revenue) has never had in its possession, control or power any documents relating to any matter in question in this proceeding other than those listed in Schedules A, B and C.**

SWORN (etc.)

____

(Signature of deponent)

FORM 113

QUESTIONS ON WRITTEN EXAMINATION FOR DISCOVERY

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

QUESTIONS ON WRITTEN EXAMINATION FOR DISCOVERY

The (identify examining party) has chosen to examine the (identify person to be examined) for discovery (where the person is not a party, state whether the person is examined on behalf or in place of or in addition to a party or under a Court direction) by written questions and requires that the following questions be answered by affidavit in Form 114 prescribed by the *Tax Court of Canada Rules (General Procedure)*, and served within thirty days after service of these questions.

(Where a further list of questions is served under section 116 substitute:)

The (identify examining party) requires that the (identify person to be examined) answer the following further questions by affidavit in Form 114 prescribed by such rules, and serve them within thirty days after service of these questions.

1. **(Number each question. Where the questions are a further list under section 116, number the questions in sequence following the last question of the previous list.)**

Date: ______________________

(Signature)

(Name, address and telephone number of examining party's counsel or examining party)

TO: **(Name and address of counsel for person to be examined or of person to be examined)**

FORM 114

ANSWERS ON WRITTEN EXAMINATION FOR DISCOVERY

TAX COURT OF CANADA

BETWEEN:

(name)

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

ANSWERS ON WRITTEN EXAMINATION FOR DISCOVERY

I, (full name of deponent), of the (City, Town, etc.) of . . . ., in the (Province, Territory, etc.) of . . .. (identify the capacity in which the deponent makes the affidavit), MAKE OATH AND SAY (or AFFIRM) that the following answers to the questions dated (date) and submitted by the (identify examining party) are true, to the best of my knowledge, information and belief:

1. **(Number each answer to correspond with the question. Where the deponent objects to answering a question, state: I object to answering this question on the ground that it is irrelevant to the matters in issue or that the information sought is privileged because (specify) or as may be.)**

SWORN (etc.)