Docket: 2010-3940(IT)G

BETWEEN:

IMPERIAL TOBACCO CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on October 10 and 12 and November 6, 2012
at Toronto, Ontario.

Before: The Honourable Justice Steven K. D'Arcy

Appearances:

Counsel for the Appellant:	Al Meghji Pooja Samtani
Counsel for the Respondent:	Bobby J. Sood Ernesto Caceres Rita Araujo

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ORDER

Upon hearing from the parties;

In accordance with the attached Reasons for Order:

a) The Respondent's application for an order from the Court directing the Appellant to attend and be cross-examined on its Affidavit of Documents is dismissed;

b) Pursuant to paragraph 88(*b*) of the *Tax Court of Canada Rules (General Procedure)*:

a. The Respondent shall provide the Appellant, within 30 days of the date of my Order, with a list of the specific documents listed in Schedule A of the Appellant's List of Documents in respect of which she requires metadata. The Appellant shall, within 120 days of the date of my Order, amend its List of Documents to list the required metadata in either Schedule A or Schedule C of its List of Documents.

b. The parties shall, within 30 days of the date of my Order, agree on the specific search terms that the Appellant will use to search its database in respect of the documents described in Schedule C of its List of Documents as "[d]ocuments in electronic form that have been deleted and have not been recovered or restored." The Appellant shall, within 120 days of the date of my Order, amend Schedule A of its List of Documents to include documents that it has recovered using the search terms.

c. The Appellant shall, within 120 days of the date of my Order, amend Schedule A of its List of Documents to include the documents in respect of which it has incorrectly claimed privilege, being documents 2, 3, 4 (as redacted in accordance with the Reasons for Order), 5, 9, 10, 12, 26, 27, and 34. It shall also include in Schedule A the emails contained in documents 11 and 18 that are not privileged.

c) There will be no order with respect to costs.

Signed at Ottawa, Canada, this 15th day of April 2013.

"S. D'Arcy"

D'Arcy J.

Citation: 2013TCC135
Date: 20130415
Docket: 2010-3940(IT)G

BETWEEN:

IMPERIAL TOBACCO CANADA LIMITED,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

D'Arcy J.

[1] The Respondent has brought a motion seeking:

(a) An order, pursuant to subsection 82(6) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*"), directing the Appellant to attend and be cross-examined on its affidavit of documents sworn on July 16, 2012 (the "Affidavit of Documents").

(b) In the alternative, an order pursuant to paragraph 88(*a*) of the *Rules*, directing the Appellant to attend and be cross-examined on the Affidavit of Documents.

(c) In the further alternative, an order pursuant to paragraph 88(*d*) of the *Rules*, directing the Appellant to produce true copies of all 42 documents listed in Schedule B of the Affidavit of Documents for inspection by this Court to determine the validity of the claims of privilege.

(d) An order extending the deadlines for completion of discovery examinations, undertakings, etc.

[2] By an order dated October 23, 2012, I granted the Respondent's request for an extension of the deadlines for the completion of the examinations for discovery and undertakings and for reporting to the Court. The remaining issues in this motion relate to the Appellant's List of Documents provided under the Court's full disclosure rules.[1]

[3] More specifically, the issues relate to the following:

- what is referred to as *metadata* in respect of documents included in Schedule A of the List of Documents,

- the electronic documents the Appellant describes in Schedule C as "[d]ocuments in electronic form that have been deleted and have not been recovered or restored," and

- the documents listed in Schedule B in respect of which the Appellant has claimed solicitor-client privilege.

Background

[4] British American Tobacco p.l.c. ("BAT") is the parent company of a number of companies, including the Appellant, British American Tobacco Australia Limited ("BATA") and BAT Italy Investments Ltd. ("BATI"). (The four companies will be collectively referred to as the "Affiliated Companies".) The Appellant acquired preferred shares of BATA in 2001 for a subscription price of $483,910,000 and preferred shares of BATI in 2003 for a subscription price of $879,535,000. The Minister has disallowed approximately $600 million that the Appellant deducted in respect of dividends received from BATA and BATI.

[5] The issue in this appeal is whether the provisions of paragraph 95(6)(*b*) of the *Income Tax Act* (the "*Act*") apply to the relevant transactions. This paragraph provides, in part, as follows:

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[1] Section 82 of the *Rules*.

> For the purposes of this subdivision (other than section 90),
>
> [. . .]
>
> (*b*) where a person . . . acquires or disposes of shares of the capital stock of a corporation . . ., either directly or indirectly, and it can reasonably be considered that the principal purpose for the acquisition or disposition is to permit a person to avoid, reduce or defer the payment of tax or any other amount that would otherwise be payable under this Act, that acquisition or disposition is deemed not to have taken place, and where the shares . . . were unissued by the corporation . . . immediately before the acquisition, those shares . . . are deemed not to have been issued.

[6] This is not the first motion brought by the Respondent. On March 19, 2012, the Respondent brought a motion seeking:

(a) an order striking out the Notice of Appeal on the basis that it discloses no reasonable grounds for appeal;

(b) an order directing the Appellant to file and serve a full disclosure list of documents as provided in section 82 of the *Rules*;

(c) an order directing the Appellant to produce a knowledgeable current or former director of the Appellant to be examined for discovery as provided in subsection 93(2) of the *Rules*; and

(d) an order compelling the Appellant to answer certain discovery questions and follow-up questions and produce certain documents.

[7] On May 1, 2012, Justice Webb issued an order dismissing the Respondent's application to strike the Notice of Appeal and deferred the Court's decision with respect to the unanswered questions and undisclosed documents. However, he ordered, pursuant to section 82 of the *Rules*, each party to "file and serve on each other party a list of all the documents that are or have been in that party's possession, control or power relevant to any matter in question between them in this appeal." This is generally referred to as full disclosure of documents.

[8] Justice Webb also ordered the Appellant to "choose one of the two remaining individuals who were directors at the time that the preferred shares were acquired to be examined on behalf of the Appellant." The Appellant chose Mr. Luc Jobin.

[9] The Appellant and the Respondent each filed with the Court a List of Documents (Full Disclosure). Schedule A to the Appellant's List of Documents notes 249 documents in the possession, control or power of the Appellant.

Schedule B to the Appellant's List of Documents notes, pursuant to paragraph 82(2)(*b*) of the *Rules*, 42 documents in respect of which the Appellant claims solicitor-client privilege.

[10] Schedule C to the Appellant's List of Documents refers to the following two sets of documents that were formerly in the possession, control or power of the Appellant, but are no longer in the Appellant's possession, control or power:

> 1. Where applicable, originals of documents listed in Schedules A and B that were sent or delivered by the Appellant to the person to whom they were addressed.
>
> 2. Documents in electronic form that have been deleted and have not been recovered or restored.

[11] The Respondent subsequently brought this motion.

[12] At the commencement of the hearing, I informed the parties that I would first hear argument with respect to the cross-examination on the Appellant's Affidavit of Documents and would then decide if the Court required argument with respect to the alternative relief sought by the Respondent, i.e., the production of the documents listed in Schedule B for inspection by the Court to determine the validity of the claims of solicitor-client privilege.

[13] On October 10 and 12, 2012, I heard argument from the parties with respect to the cross-examination issue. During his argument on October 10, 2012, counsel for the Appellant informed the Court that the Appellant was "happy" to provide the Court with copies of the documents listed in Schedule B for the Court's inspection (the "Book of Privileged Documents").

[14] Before accepting the Book of Privileged Documents, I asked counsel for the Respondent what the Respondent's position was with respect to my receiving it. Counsel stated that the Respondent did not object to my receiving the book. Counsel for the Appellant then provided the Court with the Book of Privileged Documents.

[15] On October 12, 2012, after the parties had completed their argument on the cross-examination issue, I informed them that I would reserve my decision on this issue until I heard from them with respect to the solicitor-client privilege issue. I heard argument from the parties on November 6, 2012 with respect to the issue of whether the documents listed in Schedule B of the Appellant's List of Documents were, in fact, subject to solicitor-client privilege.

[16] I will first deal with the Respondent's request to cross-examine on the Affidavit of Documents.

Cross-Examination on Affidavit of Documents

[17] Counsel for the Respondent stated that the Respondent would use the cross-examination of Mr. Edgard Goharghi, the employee of the Appellant who swore the Affidavit of Documents, as follows:

a. With respect to Schedule A of the Appellant's List of Documents, the Respondent would use the cross-examination to narrow down the number of documents for which metadata will be requested.

b. With respect to Schedule B of the Appellant's List of Documents, the Respondent would use the cross-examination to elicit additional information that will help her determine whether the Appellant has properly claimed privilege in respect of the documents. (The Respondent argued that the description of the documents in the Appellant's List of Documents does not provide sufficient information to allow a determination to be made that the Appellant has properly claimed privilege in respect of the documents).

c. With respect to Schedule C of the Appellant's List of Documents, the Respondent would use the cross-examination to determine if any relevant electronic documents have been omitted from the Appellant's List of Documents.

[18] The Respondent is relying on the following sections of the *Rules*:

> 82(1) The parties may agree or, in the absence of agreement, either party may apply to the Court for an order directing that each party shall file and serve on each other party a list of all the documents that 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.
>
> (2) Where a list of documents is produced in compliance with this section, the list shall describe, in separate schedules, all documents relevant 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 (Form 82(4)A and 82(4)B),
>
> [. . .]
>
> (*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 . . . .
>
> (5) The affidavit shall contain a statement that the party has never had possession, control or power of any document relevant 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*.
>
> [. . .]
>
> 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
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> (*d*) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

[19] I heard argument from the parties with respect to the application of subsection 82(6) and section 88 of the *Rules*.

[20] Counsel for the Respondent began his argument by referring to paragraph 95(1)(*c*) of the *Rules*, which provides that, during the examination for discovery of a person, no question may be objected to on the basis that the question constitutes cross-examination on the affidavit of documents of the party being examined. He argued that under this provision he could cross-examine Mr. Luc Jobin on the Appellant's List of Documents during Mr. Jobin's discovery.[2] Mr. Jobin is the former director of the Appellant who the Appellant has chosen to be examined for discovery in satisfaction of Justice Webb's Order of March 19, 2012.[3]

[21] While counsel for the Respondent believes he can cross-examine Mr. Jobin, he is concerned that Mr. Jobin will not have personal knowledge of the Appellant's List of Documents. I have a much more significant concern.

[22] Justice Webb's order states the following:

> The Appellant shall choose one of the two remaining individuals who were directors at the time that the preferred shares were acquired to be examined on behalf of the Appellant. The examination of such person shall not include any questions for which a satisfactory answer was provided by the representative previously chosen by the Appellant during his discovery examination or as a result of any follow-up questions that have been answered. The examination of such person shall be limited to the line of inquiry that was frustrated by the refusal of the representative of the Appellant to answer questions related to what the board of directors considered in making the decision to approve the acquisitions of the preferred shares that are in issue in this appeal or to seek any further information from the former members of the board of directors in relation to this.
>
> [Emphasis added.]

[23] It appears that counsel for the Respondent is suggesting that the Respondent may ignore the portion of this Court's May 19, 2012 Order that restricts the examination of Mr. Jobin to questions relating to what the board of directors considered in making the decision to approve the acquisitions of the preferred shares that are in issue in this appeal. I am extremely surprised by counsel's submission. I do not intend to entertain an argument that is based upon a party ignoring an order of this Court.

[24] With respect to the relevant sections, counsel for the Respondent argued that there is no threshold test in subsection 82(6). The subsection merely states that the

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2 Transcript, October 10, 2012, page 24.

3 *Ibid.*, pages 21-22.

Court may direct a party to attend and be cross-examined on an Affidavit of Documents delivered under section 82. Counsel argued that the subsection does not require the examining party to justify the cross-examination or to identify objectives that the examining party wishes to pursue. Counsel further argued that the only reason leave is required under subsection 82(6) is that the cross-examination is conducted at a time other than discovery.

[25] Counsel for the Respondent acknowledged that section 88 contains a threshold test and that, once the test is satisfied, the Court may apply any of the four remedies set out in section 88. One of the four remedies is cross-examination on the Affidavit of Documents. He argued that the reason for the section 88 threshold test is the inclusion in section 88 of the three remedies that are not available under subsection 82(6).

[26] Counsel for the Respondent also argued that allowing cross-examination on the Affidavit of Documents is the proper first step that the Court should take before considering the other remedies under section 88. In support of her position, the Respondent relies on the decisions of this Court in *Heinig v. The Queen*[4] and *9005-6342 Québec Inc. v. The Queen*.[5] I do not find either of these decisions particularly helpful. In his decision in *Heinig*, Justice Webb decided that in the fact situation in front of him the proper remedy under section 88 was cross-examination on the list of documents. However, he does not state, or even imply, that the Court should use this remedy before it considers the other remedies available under section 88.

[27] My colleague Justice Hogan's decision in *9005-6342 Québec Inc.* simply does not address the issue of when leave should be granted under subsection 82(6) or section 88 of the *Rules*, other than to refer to Justice Webb's decision in *Heinig*.

[28] Counsel for the Appellant argued that subsection 82(6) and section 88 must be read together. He argued that subsection 82(6) takes away the automatic right to cross-examine on an affidavit. It is the Appellant's position that subsection 82(6) provides that a party must obtain leave and section 88 particularizes what the party must show in order to obtain leave. Counsel argued that there must be something *prima facie* wrong with the List of Documents before the Court will grant leave to cross-examine.

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4 2009 TCC 47, 2009 DTC 1072 ("*Heinig*").

5 2010 TCC 463, 2010 G.T.C. 919, [2010] G.S.T.C. 195 ("*9005-6342 Québec Inc.*").

[29] I agree, in part, with counsel for the Appellant. Subsection 82(6) removes the automatic right to cross-examine on an affidavit. In order to give it meaning there must be some threshold before cross-examination is allowed.

[30] Subsection 82(1) of the *Rules* states that ". . . each party shall file and serve on each other party a list of all the documents that 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." [Emphasis added.]

[31] Justice Webb ordered each party to provide such a List of Documents.

[32] It is my view that the Court should considering granting leave to cross-examine if it has any concerns that the List of Documents does not satisfy the requirements of section 82 of the *Rules*. In particular, the Court should consider granting leave if it has any concerns that the List of Documents does not list all relevant documents that are in the relevant party's *possession, control or power*.

[33] However, the Court, at the same time, must consider section 88 of the *Rules*. If the Court concludes that the section 88 threshold test has been satisfied, then it should consider all of the remedies in section 88 before issuing its order. I do not accept that the Court should order cross-examination before considering the other remedies available under section 88. If the Court believes that one of the other remedies is more appropriate, then it should issue an order for such remedy. As I will discuss shortly, while I believe there are deficiencies in the Appellant's List of Documents, it is my view that paragraph 88(*b*) of the *Rules* provides the appropriate remedy, namely, the service of a further and better Affidavit of Documents.

[34] It is important for the parties to recognize that my Order does not preclude the Respondent from seeking cross-examination on the Amended Affidavit of Documents or from seeking further discovery of the Appellant's representative (i.e., the person whom the Appellant previously put forward for discovery).

[35] I will now consider the specific issues raised by the Respondent.

Metadata

[36] When referring to metadata, the parties are referring to electronic data relating to specific documents listed in Schedule A of the Appellant's List of Documents. These electronic data provide information with respect to a specific document,

information such as: the author or authors of the document, when the document was created, and a history of changes to the document.

[37] During the course of argument, counsel for the Appellant informed the Court that, at the time the parties prepared their respective Lists of Documents, they agreed to address the metadata issue as follows:

- Firstly, the parties would prepare their Lists of Documents, listing the hard copies of the documents.

- Secondly, after these lists were exchanged, counsel for the Respondent would identify the specific documents in respect of which the Respondent requires metadata.

- Finally, counsel for the Appellant would then determine if the requested metadata existed in the Appellant's computer system.

[38] The Respondent's counsel is concerned about what steps the Respondent may take if she does not agree with the Appellant's response to the request for metadata.

[39] It is my view that the metadata are information that should be listed in the List of Documents as a document separate from the hard copy of the relevant document.

[40] However, I also intend to follow the agreement of counsel, since this is clearly intended to minimize the costs of providing the information. Counsel for the Respondent will have 30 days from the date of this Order to identify the specific documents in respect of which the Respondent requires metadata. The Appellant will have 120 days from the date of this Order to amend its List of Documents to list the requested metadata in either Schedule A or Schedule C of its List of Documents.

Deleted Documents

[41] As I noted previously, Schedule C of the Appellant's List of Documents refers to the following: "Documents in electronic form that have been deleted and have not been recovered or restored."

[42] The Appellant does not state that it cannot recover the documents; it merely states that they have not been recovered.

[43] Counsel for the Respondent argued that he requires cross-examination in order to determine what has been deleted and what steps the Appellant has taken to recover the deleted documents.

[44] Counsel for the Appellant noted that, in other appeals, parties have agreed to use specific search terms to search the database of a party to determine which deleted documents may be recovered. Counsel stated that the parties have not discussed this in the current appeal.

[45] I believe that it is time for such a discussion. The parties will have 30 days from the date of my Order to agree on the specific search terms that the Appellant will use to search the database. The Appellant will have 120 days from the date of this Order to amend Schedule A of its List of Documents to include documents that it recovers using the search terms.

Documents in Respect of Which the Appellant Has Claimed Privilege

[46] As I noted previously, on October 10, 2012, the Appellant provided me with copies of the documents in respect of which it was claiming privilege. The Court has read each of the documents, heard arguments from the parties, and reached its decision with respect to whether the Appellant has properly claimed privilege. As a result, there is no need for an order under subsection 82(6) or paragraph 88(*a*) of the *Rules* allowing cross-examination on Schedule B of the Appellant's List of Documents or an order under paragraph 88(*d*) of the *Rules* directing the Appellant to produce the documents for inspection. The documents have been produced by the Appellant.

Finding on Motion Seeking Cross-Examination

[47] For the foregoing reasons, the Respondent's motion seeking an order pursuant to subsection 82(6) or paragraph 88(*a*) of the *Rules* directing the Appellant to attend and be cross-examined on its Affidavit of Documents is dismissed on the basis that such an order is not required at this point in time. Rather, pursuant to paragraph 88(*b*) of the *Rules*, the Appellant will be required to serve a further and better Affidavit of Documents in accordance with my previous comments relating to metadata and the deleted electronic documents and my comments hereunder with respect to the documents in respect of which the Appellant has claimed solicitor-client privilege.

Solicitor-Client Privilege

[48] Counsel for the Respondent and the documents themselves raise a number of issues with respect to whether the documents listed in Schedule B are subject to solicitor-client privilege. The specific issues are as follows:

- Whether certain internal communications between employees of the Appellant were privileged.
- Whether privilege was waived when privileged solicitor-client communications were shared by employees of BAT, BATA and BATI or counsel for any of these companies.
- Whether privilege was waived (or existed) when privileged solicitor-client communications were sent to an accounting firm.
- Whether there was an implied waiver by the Appellant of solicitor-client privilege with respect to legal advice received from its counsel.
- Whether the communications between the Appellant and its counsel constituted privileged legal advice or non-privileged business advice.

Overview of the Law

[49] Canadian courts have strongly guarded solicitor-client privilege. As the Supreme Court of Canada stated in *Blank v. Canada (Minister of Justice)*[6], at paragraph 26:

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

6 2006 SCC 39, [2006] 2 S.C.R. 319, [2006] S.C.J. No. 39 (QL) ("*Blank*").

[50] Solicitor-client privilege is both a rule of evidence and a substantive rule.[7] The criteria that must be satisfied before the privilege can be claimed were summarized by Justice Dickson in *Solosky v. The Queen*[8] as follows:

> . . . privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege - (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. . . .

[51] Solicitor-client privilege is permanent. It belongs to the client and only the client can waive the privilege.[9] The client may either expressly waive the protection of the privilege or waiver may be found by implication.

[52] The Appellant elected not to provide either affidavit evidence or *viva voce* evidence to support its claim for privilege. The burden rests on the person claiming solicitor-client privilege to show, on a balance of probabilities, that the document in question is privileged.[10] I have not drawn any negative inferences from the Appellant's decision not to provide either affidavit or *viva voce* evidence. However, in situations where the party claiming privilege does not produce such evidence, but provides the Court with copies of the relevant documents for inspection, the Court must make a decision based solely upon the documents. If, on the face of the document, no privilege appears to exist, then the document is not privileged.

[53] Schedule B lists correspondence between various legal counsel and employees of the Appellant, BAT and BATA. The actual correspondence discloses the following solicitor-client relationships:

- Osler, Hoskin & Harcourt LLP ("Oslers") acted for the Appellant and BAT.

- Ogilvy Renault acted for the Appellant.

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7 See *Descôteaux et. al. v. Mierzwinski*, [1982] 1 S.C.R. 860 ("*Descôteaux*") and *Blank*.

8 [1980] 1 S.C.R. 821 at page 837.

9 See *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, 2002 3 S.C.R. 209 at para. 39 and *Descôteaux* at pages 872-73.

10 Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham, Ont.: LexisNexis, 2009), at para. 14.43.

- Mallesons Stephen Jaques, an Australian law firm, acted for the Appellant.

- Allen & Overy, a UK law firm, acted for BAT with respect to BATI.

- Blake Dawson Waldron, an Australian law firm, acted for BATA, BAT and the Appellant.

[54] After reading the Book of Privileged Documents, I have concluded that the following documents represent privileged communication either between Oslers and their clients (the Appellant and BAT) or between Ogilvy Renault and their client (the Appellant):

Document Number[11]	**Document Description**	**Document Date**
1	Memorandum from Mario Tombari (Appellant) to Patrick Marley (Oslers)	April 5, 2001
7	Email from Patrick Marley (Oslers) to Steve Dale (BAT), cc Firoz Ahmed (Oslers), Mario Tombari (Appellant) and Mark Dunkley (BAT)	August 6, 2001
13	Email from Sunil Panray (Appellant) to Firoz Ahmed (Oslers) cc Patrick Marley (Oslers) and Mario Tombari (Appellant)	August 13, 2001
16	Email from Patrick Marley (Oslers) to Steve Dale (BAT), cc Mario Tombari (Appellant), Philip Andrew (BAT) and David Leach (BAT)	August 20, 2001
20	Email from Patrick Marley (Oslers) to Steve Dale (BAT), Mark Dunkley (BAT), cc Mario Tombari (Appellant)	August 30, 2001
21	Draft memorandum from Patrick Marley and Firoz Ahmed (Oslers) to Steve Dale (BAT), Mario Tombari (Appellant)	September 5, 2001
22	Draft memorandum from Lyndon Barnes and Shelley Obal (Oslers) to Don McCarty and Sunil Panray (Appellant)	September 5, 2001
29	Memorandum from Patrick Marley and Firoz Ahmed (Oslers) to Steve Dale (BAT) and	November 8, 2001

[11] Document Number from Schedule B of the Appellant's List of Documents.

	Mario Tombari (Appellant)	
36	Memorandum from Renaud Coulombe and Robert Borduas (Ogilvy Renault) to Sunil Panray and Pierre Leclerc (Appellant)	October 7, 2003
42	Memorandum from Patrick Marley, Firoz Ahmed and Drew Morier (Oslers) to Mario Tombari (Appellant)	December 11, 2003

Internal Communications Issue

[55] One of the issues raised by the Respondent, and by the documents themselves, is whether certain internal communications between employees of the Appellant are privileged.

[56] A communication between employees of a company that disseminates or discusses confidential legal advice provided by the company's lawyer is privileged. As Justice Bowie stated in *Global Cash Access (Canada) Inc. v. The Queen*[12] in discussing legal advice provided by the Department of Justice to the Canada Revenue Agency:

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

[57] However, an internal communication that does not constitute the passing on of confidential legal advice or directly involve the seeking of legal advice will not be privileged. Further, such a document does not become privileged merely because a copy is sent to a lawyer. However, if the lawyer marks the document or makes a note on it, then it becomes a working paper of the lawyer and the marked copy is privileged.[13]

[58] The following documents are emails that simply forward legal advice provided to the Appellant by legal counsel; the written advice was privileged when provided to

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12 2010 TCC 493, [2010] G.S.T.C. 145 at para. 5.

13 See *Mutual Life Assurance Co. of Canada v. The Deputy Attorney General of Canada*, 88 DTC 6511 (Ont. S.C.) at page 6513.

the client (the Appellant) and did not lose that privilege merely because it was forwarded by one employee of the Appellant to another employee.

Document Number[14]	Document Description	Document Date
6	Email from Mario Tombari to Luc Jobin and Sunil Panray (all employees of the Appellant) that forwards an email from Firoz Ahmed (Oslers) to the Appellant	August 1, 2001
23	Email from Harry Steinbrenner to Sunil Panray, Caroline Ferland and Pierre Leclerc (all employees of the Appellant) that forwards an email from Barbara Lynn Joss (Ogilvy Renault)	September 6, 2001
24	Email from Donald McCarty to Luc Jobin and Pierre Leclerc (all employees of the Appellant) that forwards an email from Ben Luscombe (Mallesons Stephen Jaques).	September 26, 2001

[59] The following documents are internal documents that, on their face, disclose no legal advice or passing on of legal advice. These documents **are not privileged** and are to be listed in Schedule A of the Appellant's List of Documents:

1) **Document #2 in Schedule B**, dated April 5, 2001, which is identified in Schedule B as a memorandum from Mario Tombari (Appellant) to Fergus Heaton and Steve Dale (BAT), with copies to Luc Jobin (Appellant) and Patrick Marley (Oslers). The document consists of three pages. Mr. Tombari states on the first page: "Please find herewith my preliminary comments on . . . ." [Emphasis added]. Counsel for the Appellant argued that the document represents the relaying by an employee of the Appellant of legal advice obtained from Oslers. There is no evidence before me to support such a conclusion. The document appears only to contain Mr. Tombari's view of the proposed transaction and to state potential issues that he has identified. There is no mention in the memorandum of legal advice obtained from the Appellant's legal counsel. The mere fact that a copy of the unmarked document is sent to Oslers is not sufficient, in and of itself, for me to find that the document is connected with the provision of legal advice. Counsel for the Appellant noted that Document

[14] Document Number from Schedule B of the Appellant's List of Documents.

#2 is similar to Document #1 sent by Mr. Tombari to Oslers on April 5, 2001. That is true; however, in Document #1 Mr. Tombari specifically requests Oslers' comments. The Appellant did not present any evidence to the Court that Document #1 was sent before Document #2 was sent, that Oslers provided advice in respect of Document #1, or that such advice, if provided, was incorporated into Document #2. I must make my decision on the basis of the evidence before me.

2) **Document #3 in Schedule B,** dated April 5, 2001, which is identified in Schedule B as a memorandum from Mario Tombari (Appellant) to Fergus Heaton and Steve Dale (BAT), with copies to Luc Jobin (Appellant) and Patrick Marley (Oslers). This document is identical to Document #2, except that it contains handwritten notes. It is not clear who made the handwritten notes. My decision on Document #3 is the same as for Document #2: there is no evidence before me that it is connected with the provision of legal advice and it is not privileged.

3) **Document #5 in Schedule B**, dated July 26, 2001, which is identified in Schedule B as a memorandum from Mario Tombari (Appellant) to Steve Dale (BAT), with copies to Luc Jobin and Sunil Panray (Appellant) and Patrick Marley (Oslers). The document comprises two pages. It is clear from the document that Mr. Tombari is providing answers to questions asked by Mr. Dale in a July 25, 2001 email. There is no mention in the document of legal advice obtained from the Appellant's counsel. There is no evidence before me to support a factual finding that the document represents the relaying by Mr. Tombari of legal advice provided by Oslers.

4) **Document #26 in Schedule B**, dated October 18, 2001, which is identified in Schedule B as a fax from Mario Tombari (Appellant) to Steve Dale (BAT), with copies to Luc Jobin, Sunil Panray, Harry Steinbrenner and Pierre Leclerc (Appellant) and Patrick Marley (Oslers). The document is a two-page fax; the cover sheet discusses a recent CCRA release, and the actual release is the second page of the fax. There is no mention in the document of legal advice obtained from the Appellant's counsel. There is no evidence before me to support a factual finding that the document represents the relaying by Mr. Tombari of legal advice provided by Oslers.

5) **Document #27 in Schedule B,** dated October 18, 2001, which is identified in Schedule B as a memorandum from Mario Tombari (Appellant) to Richard Williams (BAT), with copies to seven employees of BAT, four

employees of the Appellant, and Patrick Marley (Oslers). The document states that it provides the Appellant's comments on BATA preferred shares. There is no mention in the document of legal advice obtained from the Appellant's counsel. There is no evidence before me to support a factual finding that the document represents the relaying by Mr. Tombari of legal advice provided by Oslers.

6) **Document #34 in Schedule B,** dated August 27, 2003, which is identified in Schedule B as an email from Mario Tombari to Sunil Panray. However, the email is actually from Fergus Heaton (BAT) to Sunil Panray (Appellant), with copies to Justin Smith, Steve Burton and Neil Wadey (BAT), Harry Steinbrenner and Mario Tombari (the Appellant) and Patrick Marley (Oslers). The email provides Mr. Heaton's comments on a withholding tax issue. There is no mention in the document of legal advice obtained from legal counsel. There is no evidence before me to support a factual finding that the document represents the relaying by Mr. Heaton of legal advice provided by Oslers or any other law firm.

7) A portion of **Document #4 in Schedule B is not privileged.** The document, dated July 24, 2001, is identified in Schedule B as a memorandum to file from Mario Tombari (Appellant), with copies to Luc Jobin and Sunil Panray (Appellant) and Patrick Marley (Oslers). The document is two pages long and appears to be answering seven questions. However, it is not clear from the document who asked the questions. The document is not addressed to anyone. The answers to the first six questions appear to provide Mr. Tombari's view on certain income tax issues. There is no mention of legal advice obtained from the Appellant's legal counsel. The answer to the seventh question refers to the matter of whether Oslers is able to provide a legal opinion. This is the only portion of the document that relates to the provision of legal advice and will be redacted by the Appellant. The remainder of the memorandum to file, which contains the answers to the first six questions and the comments on page 2, is not privileged. The redacted document is to be listed in Schedule A of the Appellant's List of Documents.

Confidentiality Issue

[60] Clearly, confidentiality is one of the key requirements that must be satisfied before a court will find that a communication enjoys solicitor-client privilege. As the Ontario Court of Appeal noted in *R. v. Dunbar*[15], at paragraph 53 QL:

> An essential condition of the solicitor-client privilege is that the communication in respect of which privilege is claimed has been made in circumstances which indicate that it was made with the intention of confidentiality. Generally, if the communication is intended to be revealed to a third person, the element of confidentiality will be lacking. Similarly, in most cases the presence of a third person when the communication was made indicates that the communication was not intended to be confidential. But the presence of a third person may not have that effect; for example, it will not have that effect if it is reasonably necessary for the protection of the client's interest. See Wigmore on Evidence, (McNaughton Rev.), vol. a, pp. 599-603; McCormick on Evidence, 2d ed., p. 187-89; Cross on Evidence, 5th ed. (1979), p. 289.

[61] Schedule B to the Affidavit of Documents discloses that the legal communications were revealed to third parties.

Solicitor-Client Communications Disclosed to Employees of Affiliated Companies

[62] In the first instance, certain communication between the Appellant and its counsel was disclosed to employees of BAT and BATA. Similarly, certain legal communication between each of BAT and BATA and their respective legal counsel was revealed to employees of the Appellant. Such disclosure will negate the solicitor-client privilege unless BAT and BATA had a *common interest* with the Appellant.

[63] Solicitor-client privilege may be maintained when one party to a commercial transaction provides privileged documents to another party to the transaction. This may occur when the party provides the documents to further the common interest of having the transaction concluded and the parties do not intend to waive the privilege attached to the documents.[16] This is known as *common interest privilege*.

[64] The British Columbia Supreme Court in *Fraser Milner Casgrain LLP et al. v. M.N.R.* explained the reason for the common interest privilege as follows:[17]

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15 [1982] O.J. No. 581 (QL), (1982), 68 C.C.C. (2d) 13.

16 See *Archean Energy Limited et al. v. M.N.R.*, 98 DTC 6456 (Alta. Q.B.).

17 2002 BCSC 1344, 2003 DTC 5048 at para. 14. See also *Pitney Bowes of Canada Ltd. v. The Queen*, 2003 FCT 214, 2003 DTC 5179.

> . . . To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that 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.

[65] The common interest privilege may not apply if the parties are adverse in interest. This is not an issue in the current appeal. The Appellant, BATA and BATI are all subsidiaries of BAT. They were all working towards the same economic and commercial goals.

[66] Each of the parties operated in a different legal jurisdiction, as a result the parties required counsel with expertise in Canadian, Australian and Italian law. It appears that in certain instances each party retained its own legal counsel and, in others, two or more parties shared legal counsel. Regardless of who retained which law firm, the legal advice provided by the various law firms was shared among all of the parties to the transaction and with the parent company, BAT. It is clear from reading the documents in respect of which privilege is claimed that the legal advice provided by all of the law firms was obtained by the parties to facilitate the completion of the transactions and was for the benefit of all parties, including the parent company, BAT.

[67] After reading all of the documents, I have concluded that, to the extent that a party shared legal advice provided to it by its legal counsel with one of the other parties to the transactions or with the parent company, BAT, the party did not intend to waive privilege in respect of the document. Further, the document was still privileged under the *common interest privilege*.

[68] Specifically, I have concluded that the following documents represent privileged communications between legal counsel and their client where the communication was made in the course of either the client seeking legal advice or the legal counsel providing legal advice, and the privilege was not lost or waived when the communication was shared by employees of the Affiliated Companies:

Document Number[18]	**Document Description**	**Document Date**
8	Three emails: email from Mario Tombari to Luc Jobin and Sunil Panray (all employees of	August 6 and 8, 2001

[18] Document Number from Schedule B of the Appellant's List of Documents.

	the Appellant) forwarding email from Steve Dale (BAT) to Patrick Marley (Oslers) which contains and discusses legal advice provided by Blake Dawson Waldron in an attached email that was sent to several employees of BAT and BATA.	
14	Two emails: email from Mario Tombari to Luc Jobin and Sunil Panray (all employees of the Appellant) forwarding email from Steven Dale (BAT) to Patrick Marley (Oslers) in which legal advice is discussed; second email is sent as cc to one employee of Appellant and two employees of BAT	August 15 and 16, 2001
15	Five emails: email from Mario Tombari to Luc Jobin and Sunil Panray (all employees of the Appellant) forwarding four emails between Steven Dale (BAT) and Patrick Marley (Oslers); the four emails all discuss legal advice and are sent as cc to several employees of the Appellant and BAT	August 15-17, 2001
17	Five emails: email from Sunil Panray to Luc Jobin and Harry Steinbrenner, cc Christine Benoit and Mario Tombari (all employees of the Appellant) forwarding email from Philip Andrew (BAT) to Mr. Panray which discusses and contains various emails between Patrick Marley (Oslers) and several employees of BAT and the Appellant; all the emails either relate to advice provided by Oslers or request additional legal advice from Oslers	August 17-20, 2001
19	Two emails: first email from Steve Dale (BAT) to Patrick Marley (Oslers), cc to Mario Tombari (Appellant), in which Mr. Dale requests Oslers to provide legal advice with respect to the second email	August 24 and 29, 2001
25	Email from Philip Andrew to various employees of the Appellant which forwards an email containing legal advice provided by Blake Dawson Waldron to BAT	October 12, 2001
28	Three emails: email from Sunil Panray	October 26, 2001

	(Appellant) to Richard Williams (BAT), cc to two employees of the Appellant; Mr. Panray's email replies to a previous email of Mr. Williams that forwarded legal advice provided to BAT by Blake Dawson Waldron	
30	Three emails: first email from Sunil Panray to Luc Jobin and Harry Steinbrenner (all employees of the Appellant) forwarding email from Fergus Heaton (BAT) to Mr Panray and a number of employees of BAT and the Appellant that discusses legal advice contained in an attached email from Patrick Marley (Oslers)	August 12, 2003
31	Two emails: mail from Fergus Heaton (BAT) to Sunil Panray and a number of employees of BAT and the Appellant that discusses legal advice contained in an attached email from Patrick Marley (Oslers)	August 12, 2003
32	Four emails: First email from Sunil Panray to Luc Jobin (both employees of the Appellant) forwarding an email from Mr. Panray to Fergus Heaton (BAT), which replies to Mr. Heaton's email noted in the description for Tab 30	August 12 and 13, 2003
33	Two emails: email from Mario Tombari to Harry Steinbrenner and Sunil Panray (all employees of the Appellant) forwarding email from Patrick Marley (Oslers) to Fergus Heaton (BAT) and Mr. Tombari that contains legal advice	August 22 and 30, 2003
35	Six emails: email from Mario Tombari to Sunil Panray (both employees of the Appellant), cc to various employees of BAT and the Appellant, which discusses various issues raised in the five attached emails, the earliest being an email from Patrick Marley (Oslers) to Fergus Heaton (BAT), cc to Mr. Tombari; all the emails either relate to advice provided by Oslers or request additional legal advice from Oslers	August 6-27, 2003

37	Three emails: first email is from Mario Tombari to Luc Jobin and Sunil Panray (all employees of the Appellant) forwarding email from Fergus Heaton (BAT) to Mr. Tombari and various employees of BAT which discusses and contains an email from Allen & Overy to various BAT employees that contains legal advice	September 3, 8 and October 9, 2003
38	Three emails: first email from Mario Tombari to Luc Jobin, Pierre Leclerc and Sunil Panray (all employees of the Appellant) forwarding an email from Mr. Tombari to Blake Dawson Waldron, cc to two employees of BAT, which replies to an email from Blake Dawson Waldron to Mr. Tombari and an employee of BAT that contains legal advice	December 9, 2003
39	Two emails: first email from Mario Tombari to Luc Jobin, Pierre Leclerc and Sunil Panray (all employees of the Appellant) forwarding an email from Blake Dawson Waldron to Mr. Tombari and various employees of BAT that contains legal advice.	December 9, 2003
40	Two emails: first email from Mario Tombari to Luc Jobin, Pierre Leclerc and Sunil Panray (all employees of the Appellant) forwarding email from Blake Dawson Waldron to Mr. Tombari and various employees of BAT that contains legal advice	December 9, 2003
41	Four emails: first email from Mario Tombari to Luc Jobin and Sunil Panray (all employees of the Appellant) forwarding email from Mr. Tombari to two employees of BAT in reply to an email from an employee of BAT, which contains an email from Blake Dawson Waldron to an employee of BAT; all the emails either relate to legal advice provided by Blake Dawson Waldron or request additional legal advice from Blake Dawson Waldron	December 5 and 9, 2003

Solicitor-Client Privileged Documents Disclosed to an Accountant

[69] The second instance where a party revealed legal communications to a third party occurred when the Appellant, its counsel, BAT and BATA disclosed legal communications to an Australian accounting firm, PriceWaterhouseCoopers, ("PWC Australia"). PWC Australia appears to have been retained by BATA.

[70] The Courts have not extended privilege to accountants. However, an exception to the rule that solicitor-client privilege is lost when a communication between a solicitor and his/her client is disclosed to a third party, such as an accountant, exists for certain communications.

[71] The Exchequer Court in *Susan Hosiery Limited v. M.N.R.* summarized the principles that apply with respect to disclosure to accountants as follows:

> Applying these principles, as I understand them, to materials prepared by accountants, in a general way, it seems to me
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> (a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and
>
> (b) that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.[19]

[72] Counsel for the Appellant argued that the solicitor-client privilege extended to communications with PWC Australia on the basis that PWC Australia's input was necessary to the provision of legal advice by counsel. She noted that PWC Australia's relationship was with BATA rather than with BATA's counsel.

[73] Justice Doherty (dissenting in part) noted in *General Accident Assurance Company v. Chrusz*[20] that the applicability of solicitor-client privilege to third-party

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19 69 DTC 5278 at para. 11, page 5283.

20 (1999), 45 O.R. (3d) 321, [1999] O.J. No. 3291 (QL).

communications depends on the true nature of the function that the third party was retained to perform for the client.

> . . . If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.[21]

[74] The Appellant relied on the decision of the Ontario High Court of Justice in *The Mutual Life Assurance Company of Canada v. The Deputy Attorney General of Canada*.[22] That was a case in which the Ontario High Court was called upon to deal with a letter from the law firm Lang Michener to an employee of its client, Mutual Life. Attached to the letter was a memorandum described as the professional communication of Lang Michener and a firm of chartered accountants. In finding that the memorandum was privileged, the Court noted that Lang Michener "by sending the memorandum with the covering letter have accepted responsibility for the very considerable amount of legal advice contained in it."[23] The Court found that Lang Michener was responsible for the entire document.

[75] That is not the fact situation in front of me here.

[76] The Appellant chose not to provide the Court with any affidavit or other evidence to explain the relationship between PWC Australia and BATA or between PWC Australia and any of the Affiliated Companies. What counsel for the Appellant did provide me with was a confidential aid to argument that contained excerpts from a number of the documents in respect of which the Appellant is claiming privilege.

[77] These excerpts, in my view, do not establish that PWC Australia's role, whatever it was, extended to any function which could be said to be integral to the solicitor-client relationship.

[78] None of the documents describe in any way the relationship between PWC Australia and BATA; they do not refer to PWC Australia (except for two short references that I will discuss shortly), and they do not describe any accounting information that could only be provided by PWC Australia. In fact, a number of the documents I was referred to show that the Affiliated Companies had employees who were very knowledgeable with respect to accounting matters. For example, counsel

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21 *Ibid.*, at para. 120.
22 84 DTC 6177.
23 *Ibid.*, at page 6180.

for the Appellant took me to the document attached at Tab 19, which appears to have been prepared by employees of the Affiliated Companies. It contains a very detailed analysis of accounting issues.

[79] Counsel, through the aid to argument, took me to two documents that mention PWC Australia. The first is an email exchange between Oslers, the Appellant and BAT. (It is attached at Tab 12). The author of one of the emails is an employee of BAT. The email was sent to Oslers and copies went to employees of the Appellant, BAT, BATA and PWC Australia. At one point in the email, the author is requesting comments from two individuals with respect to his comments relating to an income tax/legal issue. The two individuals are only identified by their first names, however, considering the recipients of the emails, it appears that one of the individuals is an employee of BAT and the other an employee of PWC Australia. Even if I accept that one of the two individuals was with PWC, this comment only evidences the fact that BATA obtained some tax advice from PWC Australia.

[80] Similarly, the second reference to PWC Australia also involves income tax advice. Counsel for the Appellant took me to a document at Tab 19 that contains legal advice provided by Blake Dawson Waldron to BATA. It contains a one-line reference to tax advice provided by PWC Australia.

[81] The little evidence provided by the Appellant with respect to the role of PWC Australia does not establish, in my view, that PWC's role extended to any function which could be said to be integral to the solicitor-client relationship. It is clear from the documents that the Appellant and its Affiliated Companies are large, well-staffed and sophisticated. There is no reference in any of the documents to PWC Australia, its relationship with BATA, the reason for its involvement in the matter or why its involvement was required in order to provide legal advice.

[82] On the basis of the evidence before me, I have concluded that the disclosure of documents to PWC Australia constituted disclosure to a third party. Further, it is clear from the documents that the clients (BATA and BAT) were aware of the disclosure, and such disclosure was not inadvertent. As a result, the following emails (and any emails attached to them) **are not privileged**:

1) **Document #9 in Schedule B** – The second email dated August 8, 2001, which is from Steve Dale of BAT to Patrick Marley of Oslers and was also sent to Mario Tombari of the Appellant, several employees of BAT, two lawyers at Blake Dawson Waldron and a Michael Frazer **at the**

accounting firm PWC Australia, is not privileged. The first email merely forwards the second email.

2) **Document #10 in Schedule B** – The second email dated August 8, 2001, which is from Mark Dunkley of BAT to Patrick Marley of Oslers and was also sent to Mario Tombari of the Appellant, a number of employees of BAT, two lawyers at Blake Dawson Waldron and Michael Frazer and Neil Wilson **at the accounting firm** PWC Australia, is not privileged. The first email merely forwards the second email.

3) **A portion of Document #11 in Schedule B** - The second email dated August 8, 2001, which is from Steven Dale of BAT to Patrick Marley of Oslers with copies to employees of BAT and the Appellant, relates to legal advice provided by Oslers and was not disclosed to a third party. **It is privileged**. However, the third email dated August 8, 2001 (and the email attached to it) **is not privileged**. The third email was sent by Patrick Marley of Oslers to Steve Dale of BAT and was also sent to Mario Tombari and Sunil Panray of the Appellant, a number of employees of BAT, two lawyers at Blake Dawson Waldron and Michael Frazer **at the accounting firm** PWC Australia.

4) **Document #12 in Schedule B** - The second email dated August 13, 2001, which is from Steve Dale of BAT to Patrick Marley of Oslers and was also sent to Mario Tombari and Sunil Panray of the Appellant, two employees of BAT, one employee of BATA and Michael Frazer and Neil Wilson **at the accounting firm** PWC Australia, is not privileged. The first email merely forwards the second email.

5) **A portion of Document #18 in Schedule B** – The second email which is dated August 29, 2001, is from Steve Dale of BAT to Mark Dunkley of BAT, with copies to Patrick Marley of Oslers and Mario Tombari of the Appellant. It relates to legal advice provided by Oslers and was not sent to a third party. **It is privileged**. However, the third email, which is dated August 8, 2001 (and the email attached to it) is not privileged. The third email (which is also part of Document #11) was sent by Patrick Marley of Oslers to Steve Dale of BAT and was also sent to Mario Tombari and Sunil Panray of the Appellant, a number of employees of BAT, two lawyers at Blake Dawson Waldron and Michael Frazer **at the accounting firm** PWC Australia.

Implied Waiver

[83] The Respondent has also raised the issue of implied waiver of solicitor-client privilege by the Appellant. Counsel for the Respondent summarized the Respondent's position as follows: "since the Appellant has denied that tax avoidance was its principal purpose for its investments, fairness requires that the appellant not be allowed to protect documents that may show otherwise. When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice."[24]

[84] I do not agree with the Respondent's arguments on this issue.

[85] The state of mind waiver relates to the situation where a party relies, as part of a claim or defence, on legal advice it has received, where the claim or defence is based, at least in part, on its state of mind. The state of mind waiver arises by implication.

[86] The concept of implied waiver was explained by McLachlin J. (as she then was) in *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*[25], as follows:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost . . . .
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> . . .
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> . . . As pointed out in Wigmore on Evidence, McNaughton revision (1961), vol. 8, pp. 635-36, relied on by Meredith J. in *Rogers v. Hunter*, supra, double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. . . .

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24 Transcript, November 6, 2012, at page 98.

25 [1983] 4 W.W.R. 762, [1983] B.C.J. No. 1499 (QL), 35 C.P.C. 146 (B.C.S.C.) at pages 764, 765 and 766 W.W.R. and paras. 6 and 10 QL.

[87] In the current appeal, the Appellant has not put its state of mind at issue. If the Appellant's state of mind has been put at issue, the Respondent, not the Appellant, did it.

[88] By relying on paragraph 95(6)(*b*) of the *Act*, the Respondent has raised the issue of the Appellant's purpose when completing the relevant transactions. For example, at paragraph 6.44 of the Reply, the Respondent states that when determining the Appellant's tax liability for the 2002-2005 taxation years, the Minister made the following assumption of fact: "it can reasonably be considered that the principal purpose for the acquisition of the BATII Preferred Shares by ITCAN was to avoid, reduce, or defer the payment of tax otherwise payable by ITCAN [the Appellant]".

[89] The Appellant has taken the position that paragraph 95(6)(*b*) of the *Act* does not apply to the transactions. However, its pleadings do not contain any reference to legal advice that it previously obtained.

[90] In fact, in its first motion, the Respondent sought to have the Appellant's entire Notice of Appeal struck on the basis that the Appellant did not state therein its purpose in acquiring certain preferred shares. It is difficult for me to understand how the Respondent could argue, in the first instance, that the Appellant has not pleaded any intention and now argue that the Appellant has put its state of mind at issue.

[91] Regardless, a taxpayer does not put its state of mind at issue merely because it opposes an assessment that is based on a section of the *Act* that contains an intention or purpose test. It is simply not fair or reasonable to place a taxpayer in a position where it either accepts an assessment or waives privilege.

[92] Further, a state-of-mind implied waiver requires more than the fact that an appellant's purpose for entering into certain transactions is at issue in an appeal. The implied waiver requires the appellant to take the positive step of relying, in its pleadings or during trial, on legal advice it has previously obtained from its counsel.[26] The Appellant has taken no such step in the current appeal.

[93] Counsel for the Respondent also argued that the Court, when determining whether privilege should be deemed to be waived, must balance the interest of full

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[26] See *Toronto-Dominion Bank v. Leigh Instruments Ltd.*, 1997 CanLII 12113, 32 O.R. (3d) 575, at para. 61 CanLII.

disclosure for the purposes of a fair trial against the preservation of solicitor-client privilege. I do not agree.

[94] The Courts have noted that the privilege must be as close to absolute as possible to ensure public confidence and retain relevance.[27] As the Supreme Court of Canada noted in *Goodis v. Ontario (Ministry of Correctional Services)*[28] the question of disclosure of solicitor-client privileged communications does not involve a balancing of interests on a case-by-case basis.

[95] If privilege has been established and has not, either expressly or by implication, been waived by the client, then the courts will not interfere with the confidentiality of the communications unless absolutely necessary. "Absolute necessity is as restrictive a test as may be formulated short of an absolute prohibition in every case. . .."[29]

[96] The issue of whether the Appellant has waived solicitor-client privilege does not involve the balancing of one interest against another. The question that must be answered is whether, as a question of fact, the Appellant implicitly waived the solicitor-client privilege. There is no evidence before me to support a finding that the Appellant waived the privilege.

Legal Advice vs. Business Advice

[97] The Respondent questions whether the advice provided by legal counsel to one or more of the Affiliated Companies was legal advice or advice on purely business matters.

[98] A communication between a lawyer and his or her client will only be privileged if such communication is provided by the lawyer in the course of his or her practice of law. Privilege does not attach to advice provided by a lawyer on purely business matters.

[99] This issue does not arise in the current appeal. All of the documents that I have found to be privileged relate to legal advice provided by legal counsel in the course of their practice of law.

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27 *R. v. McClure* , 2001 SCC 14, [2001] 1 S.C.R. 445 at para. 35.
28 2006 SCC 31, [2006] 2 S.C.R. 32 at para. 17.
29 *Ibid.*, at para. 20.

Conclusion

[100] For the foregoing reasons:

a) The Respondent's application for an order from the Court directing the Appellant to attend and be cross-examined on its Affidavit of Documents is dismissed.

c) Pursuant to paragraph 88(*b*) of the *Rules*:

a. Counsel for the Respondent shall provide the Appellant, within 30 days of the date of my Order, with a list of the specific documents listed in Schedule A of the Appellant's List of Documents in respect of which the Respondent requires metadata. The Appellant shall, within 120 days of the date of my Order, amend its List of Documents to list the required metadata in either Schedule A or Schedule C of its List of Documents.

b. The parties shall, within 30 days of the date of my Order, agree on the specific search terms that the Appellant will use to search its database in respect of the documents described in Schedule C of its List of Documents as "[d]ocuments in electronic form that have been deleted and have not been recovered or restored." The Appellant shall, within 120 days of the date of my Order, amend Schedule A of its List of Documents to include documents that it has recovered using the search terms.

c. The Appellant shall, within 120 days of the date of my Order, amend Schedule A of its List of Documents to include the documents in respect of which it has incorrectly claimed privilege, being documents 2, 3, 4 (as redacted in accordance with the Reasons for Order), 5, 9, 10, 12, 26, 27, and 34. It shall also include in Schedule A the emails contained in documents 11 and 18 that are not privileged.

[101] In light of the mixed result, there will be no order with respect to costs.

Signed at Ottawa, Canada, this 15th day of April 2013.

"S. D'Arcy"

D'Arcy J.

CITATION:	2013TCC135
COURT FILE NO.:	2010-3940(IT)G
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PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER BY:	The Honourable Justice Steven K. D'Arcy
DATE OF ORDER:	April 15, 2013

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