

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada

Date: 20020607

Docket: T-167-00

Neutral citation: 2002 FCT 649

BETWEEN:

**BELGRAVIA INVESTMENTS LIMITED, 3438644
MANITOBA LTD., SPACE FUEL GAS PRODUCTS LTD., RES
RESOURCES LTD., SUPREME GRAPHICS LTD., J.E.
BOWES INVESTMENTS INC., 409707 ALBERTA LTD.,
BEACH AVENUE HOLDING COMPANY LTD., BAYOU
DEVELOPMENTS (1996) LTD., NLK CONSULTANTS INC.
and TRICONTINENTAL DISTRIBUTION LIMITED**

Applicants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER

HENEGHAN J.

INTRODUCTION

[1] Belgravia Investment Ltd., 3438644 Manitoba Ltd., Space Fuel Gas Products Ltd., RES Resources Ltd., Supreme Graphics Ltd., J.E. Bowes Investments Inc., 409707 Alberta Ltd., Beach Avenue Holding Company Ltd., Bayou Developments (1996) Ltd., NLK Consultants Inc.

and Tri-Continental Distribution Ltd. (the “Applicants” or “Investors Group”) seek an order pursuant to the *Income Tax Act*, R.S.C. 1985, c. 15th. Supp. (the “Act”) for a determination of solicitor-client privilege in relation to certain documents requested by the Canada Customs and Revenue Agency (the “CCRA”).

[2] The request issued by the CCRA was by letters that were served on the Applicants on or about December 10, 1999 (the “requirement letters”) pursuant to sections 231.2(1)(a) and (b) of the Act. The letters were served in the course of an audit being conducted by the CCRA. The audit concerned the Applicants’ investment in certain companies and one of the issues is whether the investment is a “tax shelter”.

FACTS

[3] The Applicants are corporations who participated in the formation of the Whitecourt Newsprint Company Limited Partnership (“WNCLP”) in 1988. This limited partnership was comprised of certain corporations controlled by one Ronald J. Stern (“Stern”) and of other corporations that were unrelated to Stern (the “WNCLP Investors”). WNCLP and the WNCLP Investors own a fifty percent interest in a joint venture that manufactures newsprint in Whitecourt, Alberta.

[4] The Applicants are some, but not all, of the WNCLP Investors. The Applicants are those WNCLP Investors who invested in Taseko Mines Ltd., Taseko Resources Inc., Pacific Sentinel

Resources Inc., Pacific Sentinel Gold Corp. or related entities (the “transactions”), and for the purpose of the transactions, constitute the Investors Group.

[5] From the creation of WNCLP, a corporation controlled by Stern acted as the agent for and on behalf of the WNCLP Investors. The first agent was RES Publications Ltd. (“RES”). Initially, RES acted as agent for all WNCLP Investors but eventually, it represented only those investors involved with the transactions. Mr. J. Keith Vancoughnett was the individual associated with RES who was involved with the Applicants from 1995 in relation to the transactions.

[6] After February 1996, Mr. Vancoughnett served as a Director and President of Chilcotin Plateau Minerals Ltd. (“Chilcotin”). After February 1, 1996, Chilcotin performed the agency function of RES through Mr. Vancoughnett.

[7] The agency function performed by RES, and later Chilcotin, included the retainer of professional advisers. In mid-1995, RES retained the McCarthy, Tétrault law firm to act as legal counsel relative to the transactions. In mid October 1995, RES engaged Sheinin and Co. as agent for and on behalf of the WNCLP Investors, including the Applicants, for the purpose of providing McCarthy Tétrault lawyers with advice and information about certain business and tax related aspects of the transactions. The Applicants claim privilege over the Sheinin documents.

[8] Lewis and Co. is an accounting firm. It was retained on or about December 1, 1995 by and on behalf of J. Poole Holdings Limited and subsequently, Beach Avenue Holdings Limited, for the purpose of communicating certain information on behalf of these companies to McCarthy, Tétrault, to assist the lawyers in providing legal advice to the WCNLP Investors or the Investors Group.

[9] Cinnamon Jang Willoughby and Company also provided accounting services and advice to CQI. CQI was a limited partner in WNCLP. Accordingly, it was a WNCLP investor. However, it was not a member of the Investors Group and did not participate in the transactions.

[10] On or about December 1, 1995, Cinnamon Jang was retained by and on behalf of CQI, purportedly for the purpose of communicating certain information concerning CQI to McCarthy Tétrault, to allow the law firm to render legal advice to the WNCLP Investors with respect to the transactions.

[11] The requirement letters required each member of the Investors Group to provide certain documents to CCRA on or before January 31, 2000, including all documentation in their respective possession or control relating to the investments made in the transactions.

[12] Upon receipt of the requirement letters, the Applicants delivered all documents in their possession or control relating to the transactions to their counsel, Mr. Douglas S. Ewens, Q.C. and instructed him to claim solicitor-client privilege in respect of those documents. Mr. Ewens is

a solicitor with McCarthy Tétrault and was one of a team of lawyers that was involved in providing legal advice to the Investors Group and the WNCLP Investors.

[13] In accordance with instructions provided by the Investors Group, Chilcotin as an agent for each member of the Investors Group, responded to the requirement letters by letters dated January 31, 2000. At this time, all documents relevant to the transactions were provided, except for those documents over which privilege was claimed. The retained documents are currently maintained under seal in the possession of Mr. Ewens. Chilcotin specifically claimed privilege on behalf of the Applicants and no others.

[14] In the present case, the parties had agreed prior to the hearing that certain documents in the hands of Mr. Ewens were privileged. This agreement followed a review of the documents in accordance with the Order of Madam Justice McGillis made on February 9, 2000. A list of these documents was filed at the hearing and is appended to these Reasons as Schedule "A". The privileged nature of these documents will be confirmed by the Order filed herein. Privilege was accorded to the Lewis privileged documents and the Cinnamon Willoughby privileged documents as the result of agreement.

[15] At the commencement of the hearing, counsel advised that agreement had been reached on further documents. These privileged documents are listed in Schedule "B".

[16] As well during the hearing, counsel for the Applicants agreed to disclose certain documents which had previously been edited. It remains, then, to determine whether the remaining documents attract solicitor-client privilege in light of the applicable legal principles and jurisprudence.

[17] The remaining disputed documents fall into three categories as follows:

1. those arising from the business of RES and Chilcotin;
2. documents related to McCarthy Tétrault, solicitors;
3. those relating to Sheinin and Co.

[18] The Applicants filed the affidavits of J. Keith Vancoughnett, Peter W. Lewis, Saunder M. Sheinin and Brian D. Peets in support of this application. The lists of challenged privileged documents is attached to the affidavit of Mr. Vancoughnett as exhibits. There is no identification provided for the documents in issue; the lists refer to the source of the documents and their date. A number code indicates the basis upon which privilege is claimed.

APPLICANTS' SUBMISSIONS

[19] The Applicants submit that the remaining challenged privileged documents are properly the subject of privilege. It is well established that the solicitor-client privilege extends to protect

the confidential communications through representatives of a client for the purpose of obtaining legal advice. The Applicants say that this basis of privilege extends to all challenged privileged documents provided to McCarthy Tétrault by Sheinin and Co., RES or Chilcotin, for the purpose of obtaining legal advice on behalf of the WNCLP Investors or the Investors Group. In this regard, the Applicants rely on *Susan Hosiery Limited v. Minister of National Revenue* (1969), 69 D.T.C. 5278 (Ex.Cr.).

[20] The Applicants argue that the principle stated in *Susan Hosiery Limited, supra*, is not confined to those circumstances where an accountant or other representative acts as a “mere conduit” for information passing between a solicitor and client. The Applicants say the courts have specifically held that where representatives, including accountants, use their own professional skills in providing information and advice to be used by counsel in rendering legal advice, the privilege still applies. Here, the Applicants rely on *Long Tractor Inc. v. Canada (Deputy Attorney General)*, [1998] 3 C.T.C. 1 at pages 10-12.

[21] The Applicants argue that where information is given by a lawyer to a representative of a client, such as an accountant, for the purpose of rendering legal advice to the client, that information is properly the subject of solicitor-client communications privilege. The Applicants claim that this basis of privilege applies to the Lewis challenged privileged document, the Cinnamon Jang challenged privileged document, as well as other challenged privileged documents provided by McCarthy Tétrault to Sheinin and Co., RES or Chilcotin, in connection with the provision of legal advice to the WNCLP Investors or the Investors Group.

[22] The Applicants further argue that, to the extent that privileged communications were disclosed to the representatives or agents of the WNCLP Investors or the Investors Group, such disclosure does not constitute a waiver of privilege over the contents or subject matter. Here the Applicants rely on *Re Alcan-Colony Contracting Ltd. et al v. Minister of National Revenue* (1971), 18 D.L.R. (3d) 32 at pages 34-35.

[23] The Applicants argue that communications between a client and the representative of the client, such as an accountant, which relates directly to the legal advice that was being sought from or received by the client's lawyer, is also the basis of solicitor-client communications privilege. Accordingly, this basis of privilege extends to all challenged privileged documents exchanged between Sheinin and Co., RES and Chilcotin and the WNCLP Investors and investor group that relate to the legal advice being sought from or received by, McCarthy Tétrault.

[24] The Applicants further submit that communications between a representative of a client and a client's lawyer for the purpose of enabling the lawyer to render legal advice to the client, are privileged. This basis of privilege extends to all challenged privileged documents exchanged between McCarthy Tétrault and Sheinin and Co., RES or Chilcotin for the purposes of requesting or providing information and advice concerning certain business and taxation related aspects of the transactions, to enable McCarthy Tétrault to provide their legal advice.

[25] The Applicants argue that communications among firm members of McCarthy Tétrault are privileged. It is further submitted that to the extent that such privileged communications were disclosed to the representatives or agents of the WNCLP Investors or the investor group, such disclosure does not constitute a waiver of privilege over the contents of the subject matter.

[26] The Applicants further submit that the work product of McCarthy Tétrault, including notes, handwritten and other memoranda, legal research and draft documents are privileged. This basis of privilege also covers all handwritten notes of McCarthy Tétrault lawyers that appear on the challenged privileged documents.

[27] The Applicants also argue that documents or copies of documents obtained by or forwarded to a lawyer, other than the McCarthy Tétrault law firm, for the purpose of assisting such lawyer to render legal advice, are privileged.

[28] Finally, the Applicants say that where there was inadvertent production of a privileged document, that document should be removed from the record and returned to counsel for the Applicants. In this regard, the Applicants refer specifically to a document which was produced during the cross-examination of Mr. Vancoughnett . That document is attached as Tab 6 of the Respondent's Application Record. Relying on the decision in *Royal Bank v. Lee* (1992), 9 C.P.C. (3d) 199 (Alta. C.A.), the Applicants argue that inadvertent production of a privileged document does not give rise to a waiver of privilege.

RESPONDENT'S SUBMISSIONS

[29] The Respondent begins by drawing a distinction between legal and business advice, and says that in the absence of existing or contemplated litigation, solicitor-client privilege only applies to communications concerning legal advice. In this regard, the Respondent relies on *Susan Hosiery, supra*, at page 5281.

[30] To the extent that McCarthy Tétrault, Sheinin and Co., Chilcotin and Lewis and Co. were merely relaying business advice or information to the Applicants, concerning the potential investment in the transactions, rather than legal advice, the Respondent argues that such communications do not attract solicitor-client privilege. Where a lawyer is simply a conduit for relaying information about certain aspects of a business transaction, such communications are not privileged.

[31] The Respondent says that although the law firm of McCarthy Tétrault was engaged to provide legal advice concerning certain aspects of the transactions, it is also clear that the law firm acted as a conduit to relay information concerning the proposed investment from Taseko and its representatives to the Applicants and their agents. The Respondent says that when the McCarthy Tétrault lawyers advised the Applicants concerning the terms of the proposed investment, their lawyers were not providing legal advice but merely providing information concerning the proposed investment.

[32] The Respondent further argues that even if the challenged privileged documents were considered to be communications relating to the request for legal advice, there has been an implied waiver of privilege that puts receipt of that advice in issue. The Respondent raises two arguments about waiver.

[33] First, the Respondent argues that the Applicants have waived any solicitor-client privilege that may have existed in the challenged privileged documents, relative to the existence of tax shelter investments, by referring to such investments in the statutory declaration executed by Mr. Vancoughnett in response to the requirement letters.

[34] The Respondent submits that when the Applicants put a particular statement of fact in issue in its pleadings, they are deemed to have waived any privilege attaching to the relevant documents. The Respondent here relies on *Potash Corporation of Saskatchewan Mining Ltd. v. Saskatchewan Government Insurance* (1990), 83 Sask. R. 19 (Sask. Q.B.) and *Lloyds Bank Canada v. Canada Life Assurance Co.* (1991), 47 C.P.C. (2d) 157 (Ont. Gen. Div.).

[35] The Respondent argues that to allow the Applicants to clothe all communications with solicitor-client privilege and at the same time deny that communications on a particular subject matter occurred, would not be fair. The Respondent says that such a denial puts the entire communication, and its status, in issue and may constitute waiver of privilege.

[36] The Respondent argues that since the Applicants have denied receipt of statements or representations concerning deductions or losses relating to the Taseko investments, fairness dictates that the Applicants not be allowed to protect documents that may show otherwise, under the guise of solicitor-client privilege.

[37] Finally, the Respondent argues that insofar as otherwise privileged documents were made available to third parties, the privilege was waived as a consequence of such communication or production. This argument was raised in respect of specific documents discussed during the hearing of this application.

ISSUES

[38] The following issues arise from this application.

1. What are the applicable principles governing determination of solicitor-client privilege where non-legal professional advisers are involved?
2. Does the statutory declaration give rise to implied waiver of solicitor-client privilege?
3. If privilege has been established, has it been waived by production of the documents to third parties?

4. If privilege has been established, what is the effect of inadvertent production of documents?

5. Which of the remaining challenged documents are subject to solicitor-client privilege?

ANALYSIS

[39] The starting point for consideration of solicitor-client privilege pursuant to the Act is found in section 232(1). That section defines “solicitor-client privilege” as follows:

232(1) In this section, “solicitor-client privilege” means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.

232(1) Les définitions qui suivent s'appliquent au présent article.
« privilège des communications entre client et avocat »
Droit qu'une personne peut posséder, devant une cour supérieure de la province où la question a pris naissance, de refuser de divulguer une communication orale ou documentaire pour le motif que celle-ci est une communication entre elle et son avocat en confiance professionnelle sauf que, pour l'application du présent article, un relevé comptable d'un avocat, y compris toute pièces justificative out tout chèque, ne peut être considéré comme une communication de cette nature.

i. General Principles

[40] The jurisprudence has established that there are two distinct branches of solicitor-client privilege: litigation privilege and legal advice privilege. The former protects all communications between the solicitor, client or third parties made in the course of existing or contemplated litigation. The latter protects all communications between a solicitor and client and third parties,

that directly relate to the seeking, formulating or giving of legal advice. In *Re Alcan-Colony Contracting Ltd. et al. v. Minister of National Revenue, supra* at 35, the Court found that a claim for privilege need not be based upon litigation, actual or contemplated, as long as the communications at issue “pass as professional communication in a professional capacity.”

[41] These classes were recognized by the Federal Court of Appeal in *Samson Indian Nation and Band v. Canada* [1995] 2 F.C. 762 (C.A.) at page 769. Concerning the legal advice privilege, the Court said:

...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.

[42] The hallmark of the solicitor-client relationship is confidentiality. The solicitor-client privilege applies to those communications, oral and written, made in the context of that relationship and for the purpose of obtaining legal advice. In *Descôteaux et al v. Mierzwinski*, [1982] 1 S.C.R. 860 Lamer J. (as he then was) said at pages 872-873

...It should be pointed out that the substantive conditions precedent to the existence of the privilege, which the judges have gradually established and defined, are in fact the substantive conditions precedent to the existence of the right to confidentiality, the former being merely the earliest manifestation of the latter...

The following statement by Wigmore (8 Wigmore, *Evidence*, para. 2292 (McNaughton rev. 1961) of the rule of evidence is a good summary, in my view, of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:

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

Seeking advice from a legal adviser includes consulting those who assist him professionally (for example, his secretary or articling student) and who have as such had access to the communications made by the client for the purpose of obtaining legal advice.

There are exceptions. It is not sufficient to speak to a lawyer or one of his associates for everything to become confidential from that point on. The communication must be made to the lawyer or his assistants in their professional capacity; the relationship must be a professional one at the exact moment of the communication.

Communications made in order to facilitate the commission of a crime or fraud will not be confidential either, regardless of whether or not the lawyer is acting in good faith.

[43] In *Susan Hosiery, supra*, Jackett P. thoroughly reviewed the bases of solicitor-client privilege and said as follows at page 5283:

(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.

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

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

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

[46] Furthermore, no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer. In *General Accident Assurance Company et al v. Chursz et al* (1998), 37 O.R. (3d) 790 at page 796 (reversed on other grounds (2000), 45 O.R. (3d) 321), the Court said "An original document that is clothed with no privilege does not acquire privilege simply because it gets into the hands of a solicitor."

[47] The party asserting the privilege carries the evidentiary burden. The Applicants must show, on a balance of probabilities, that the documents in question are a communication between a solicitor and client that involves the seeking or giving of legal advice, and that the parties intend to be confidential. In this regard, see *Solosky v. The Queen* (1979), 50 C.C.C. (2d) 495 at page 510.

[48] The party claiming the privilege must do more than baldly assert the privilege. In *R. v. Morra* (1991), 68 C.C.C.(3d) 273 at page 276 (Ont. Gen. Div.), Dunnett J. said:

In my view, once the documents have been seized, a lawyer cannot hide behind a code of silence and claim privilege with respect to all communications. At the very least, the lawyer must adduce reasonable evidence, either *viva voce* or by affidavit, from which the court can infer a solicitor-client relationship and solicitor-client privilege. To meet the criteria for the privilege, it is necessary to show that: there were communications between the lawyer and client; those communications entailed

the seeking or giving of legal advice, and the advice was intended to be confidential by the parties.

[49] The limits on solicitor-client privilege, in relation to non-legal professionals, has been considered. The general rule is that communications, statements or other materials prepared by third parties for and on behalf of a solicitor are subject to the privilege only where those documents are prepared in contemplation of litigation; see *Long Tractor Inc. v. Canada, supra*.

[50] Accounting documents will be subject to the privilege if the accountant is used as a representative of a client to obtain legal advice; see *Gregory v. Canada (Minister of National Revenue)*, [1992] D.T.C. 6518. Where a communication is made to an agent, such as an accountant who must consider it and provide an individual opinion, no privilege attaches. Where a document is created by a lawyer who has been consulted by the client's own lawyer in relation to the client's business, the general rule is that such documents will be privileged; see *Re Klassen-Bronze Ltd. et al* (1970), 70 D.T.C. 6361.

ii. Waiver

[51] The Respondent raises the question of whether there has been a waiver of solicitor-client privilege in relation to the documents in dispute. The Respondent bases this argument on the reference in the statutory declaration filed by Mr. Vancoughnett which says, in part, that the Applicants have put the making of "representations" in issue and expands this to suggest that the issue of tax shelters pursuant to section 237.1 of the Act is consequently put in issue.

[52] The Applicants deny that they have implicitly waived any privilege over any documents as a result of the statutory declaration executed by Mr. Vancoughnett. The statutory declaration provides, in part, as follows:

I, Keith Vancoughnett, of the City of Vancouver, in the Province of British Columbia, do solemnly declare that:

1. I am an officer of Chilcotin Plateau Minerals Inc. and, as such, have knowledge of the matters referred to herein.
2. I have been actively involved on behalf of the group of investors listed in Schedule A (the "Investors") in the negotiation and implementation of transactions involving the investment by the Investors in Preferred Shares and Debentures of Taseko Resources Inc. (the "Transaction") pursuant to agreements dated March 5, 1996.
3. I am not aware of any officer, employee, lawyer, accountant, agent or other representative of Taseko Mines Limited or Taseko Resources Inc. having made any statement or representation of any kind to any Investor or any Investor's representative in connection with the Transaction and the interests to be acquired thereunder that any amount is or will be deductible for income tax purposes, in computing the income or taxable income of any Investor, which is expected to be incurred by or allocated to any such Investor or to persons not at arm's length with any such Investor (within the meaning of the *Income Tax Act* (Canada)).

And I make this solemn declaration, conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*.

[53] Furthermore, they say that the status of the investments as tax shelters is not an issue arising in the present application but remains to be dealt with in the future, if necessary, in a separate application pursuant to the Act.

[54] The Respondent filed the affidavit of Mr. Walter Wong, a chartered accountant with the CCRA who was involved in the audit. Mr. Wong raised questions as to whether the investments

under review were tax shelters, and certain paragraphs of his affidavit were challenged by the Applicants, upon a preliminary notice of motion.

[55] The motion was dismissed by Justice Teitelbaum and the issue of striking out paragraphs is a matter to be decided in this hearing.

[56] The impugned paragraphs of Mr. Wong's affidavit provide as follows:

3. The Applicants investment with the Tax Shelter Companies permitted the flow-through of exploration expenses incurred by the Tax Shelter Companies to the Applicants, which expenses could be utilized to offset other income of the Applicant.

6. One of the issues in my audit is whether the investment of the Applicants in the Tax Shelter Companies is a "tax shelter" as that term is defined in the *Act*. Basically, subsection 237.1(1) of the *Act* provides that an investment is a "tax shelter" where statements or representations have been made or proposed to be made that deductions or losses available from the investment would exceed the cost of the investment. One of the consequences of making a "tax shelter" investment is that an investor will not be permitted to deduct his share of losses or make any deductions with respect to the investment unless they file a prescribed form which contains the identification number of the tax shelter.

7. All of the Applicants claimed deductions with respect to their investment in the "Tax Shelter Companies" in excess of the costs of their investment. None of the Applicants filed a prescribed form containing an identification number with respect to their investment in the Tax Shelter Companies.

8. All of the Applicants have taken the position at the audit stage that their investment with the Tax Shelter Companies was not a "tax shelter" as defined in subsection 237.1(1) of the *Act*, and further, that no statements or representations as contemplated by subsection 237.1(1) were made or proposed to be made to them or their advisors or agents by any of the Tax Shelter Companies or their agents.

[57] In my opinion, the present application addresses only the issue of solicitor-client privilege and not the issue of tax shelters, *per se*. The present application pursuant to section 232 of the

Act has vitality only for the purpose of determining if solicitor-client privilege applies to the remaining challenged privileged documents.

[58] The mere reference in the statutory declaration to the absence of representations on tax shelters does not, in this instance, put the issue of tax shelters in play. The statutory declaration is not a pleading, in the usual sense of that term. I find that there has been no implied waiver of any privilege arising from the references in the statutory declaration to a lack of representations concerning tax shelters.

[59] In light of this conclusion, the impugned paragraphs of Mr. Wong's affidavit are irrelevant and will be struck.

iii. The Evidence

[60] The evidence submitted by the Applicants in support of the asserted solicitor client privilege consists of the affidavits of Mr. Vancoughnett, Mr. Lewis, Mr. Sheinin and Mr. Peets. Mr. Vancoughnett is a business executive; the other deponents are chartered accountants. These four deponents describe their role, and the roles of their associated businesses, as the provision of advice to McCarthy Tétrault for the purpose of assisting the lawyers in providing legal advice to the WNCLP Investors or the Applicants, as the investors in the transactions, as the case may be.

[61] No issue was taken with the existence of a solicitor-client relationship between the Applicants and the McCarthy Tétrault law firm. Mr. Vancoughnett deposed that this law firm had been engaged since mid-1995 to represent the WNCLP Investors or the Investor Group. He identified the members of the firm working in connection with the transactions. The identity of other law firms who were engaged by McCarthy Tétrault was not disclosed. According to Mr. Vancoughnett, Mr. Ewens Q.C. identified the documents for which privilege was claimed.

[62] The affidavit of Mr. Sheinin states that the partners of Sheinin and Co. were retained in mid-October 1995 for the purpose of assisting McCarthy Tétrault in the provision of legal advice to WNCLP Investors or the Investors Group, as the case may be. Mr. Sheinin identifies the employees of his company that worked on the file and he specifically retains any applicable privilege in the documents.

[63] Mr. Lewis deposes that he understood that McCarthy Tétrault were acting as legal counsel to the WNCLP Investors and the Investors Group. Again, he retains any privilege in connection with his clients J. Poole Holdings Limited and Beach Avenue Holdings Company Ltd., one of the Applicants.

[64] Mr. Peets, the sole director of B.D. Peets Inc., a corporate party of Cinnamon Jang Willoughby and Co., Chartered Accountants, states his understanding that McCarthy Tétrault were counsel for the WNCLP Investors in connection with the transactions. He too reserves any

applicable privilege in the documents on behalf of the firm's client, CQI Holdings Ltd., a limited partner of WNCLP. CQI is not one of the Investors Group.

[65] Mr. Ewens, Q.C. did not file an affidavit for use in this application. He appeared at the hearing and made comments concerning the challenged privileged documents and offered to give explanations about them. This is not evidence for the purpose of this application. In this regard I refer to the *Federal Court Rules, 1998*, Rules 301(b), 306 and 308. I refer, as well, to *Gregory v. Minister of National Revenue, supra*, which provides a good illustration of the type of affidavit which could be filed by a lawyer dealing with a client or solicitor-client privilege in the context of the Act.

[66] In short, comments from counsel do not constitute evidence. The issue of privilege will be determined on the basis of the evidence filed. In this case, that means the affidavits referred to above and related cross-examinations, as well as the remaining challenged documents.

[67] No authority was cited for the proposition that availability of solicitor-client privilege is to be considered in relation to strangers to this particular application. The grounds for this application refer only to the Applicants. However, there is evidence that the Applicants are members of the larger group of WNCLP Investors. In those circumstances, it appears that insofar as both the Applicants and the WCNLP Investors were clients of McCarthy Tétrault, privilege applies to the communications of the WCNLP Investors and the Applicants, to the lawyers. In this regard, I refer to *R. v. Dunbar* (1982), 28 C.R. (3d) 324 at 347 (Ont. C.A.).

iv. The Privileged Documents

[68] The Respondent focused primarily on the purpose of the communications moving from the Applicants to their advisers, both legal and non-legal, and the exchange of documents between the legal advisers and the other professional advisers, primarily the accountants. The Respondent conceded that if there is doubt on whether the disclosure of documents by the lawyers to the accountants was for the purpose of rendering or facilitating the provision of legal advice, the benefit of the doubt should enure to the benefit of acknowledging and maintaining the privilege, relying on the decision of the Supreme Court of Canada in *Smith v. Jones*, [1999] 1 S.C.R. 455.

[69] The Applicants have defined the grounds upon which privilege is asserted in relation to the documents as follows:

KEY TO "REASONS FOR CLAIM OF PRIVILEGE"

1. Communications from client's agent to lawyer.
2. Communications from lawyer to client or client's agent.
3. Communications between client's agent and client.
4. Use of client's agent to enable lawyer to render legal advice.
5. Communications among McCarthy Tétrault lawyers
6. Work product of McCarthy Tétrault lawyers.
7. Documents obtained by or forwarded to McCarthy Tétrault

8. Joint work product of lawyer and client's accountant
9. Privileged notes of lawyer from a non-privileged meeting or telephone call
10. Notes of accountants from meetings with lawyers.

[70] According to the list of the documents remaining in dispute, some documents fall within one or more categories. For the purpose of deciding which of the remaining challenged documents are privileged, it is not necessary to consider each of the classifications identified by the Applicants because following my review of the documents in issue, I am satisfied that it is sufficient to show that they are privileged on at least one ground.

[71] Upon reviewing the documents I am satisfied that the following documents are privileged:

- | | |
|---------------|--|
| 013582-013589 | Letter January 2, 1996 to Jack Poole; |
| 013590-013599 | Letter dated December 20, 1996 to J. Poole Holdings Limited, with attachments; |
| 013600-013607 | Letter January 2, 1996 to J. Poole Holdings Limited; |
| 014026-014029 | Communication from J. Keith Vancoughnett to Colin MacKinnon; |
| 014035-014037 | Letter from outside counsel to Colin MacKinnon of Texcan predecessor of Tri-continental; |
| 014042-014044 | Communication from Colin MacKinnon to outside counsel, May 8, 1996; |
| 014063-014123 | Draft opinion, McCarthy Tétrault, January 12, 1998; |
| 014295 | Notes, January 10, 1996, McCarthy Tétrault and Mr. Sheinin; |
| 014395-014402 | Communication from Sheinin & Co. to Mr. Ewens, McCarthy Tétrault; |

014415-014484 McCarthy Tétrault draft legal opinion;

014485-014486 McCarthy Tétrault to Mr. Vancoughnett, November 26, 1995;

014522-014530 Fax sheet for McCarthy Tétrault with draft document, to Mr. Sheinin;

014531-014539 Draft document sent from Belgravia to McCarthy Tétrault and Sheinin, December 22, 1995;

014551-014553 Internal memorandum McCarthy Tétrault, December 22, 1995;

014596-014631 Letter dated January 2, 1996 from Sheinin and Co. to Bayou Developments (014596). Page 014597 is a fax cover sheet directed to Mr. Ewens, Q.C. of McCarthy Tétrault and refers to 21 pages including the cover page. Since it is possible that the balance of the pages in this exhibit were sent to Mr. Ewens, they will be accorded privilege;

014554-104595 Draft legal opinion, McCarthy Tétrault;

014668-014669 Notes by Mr. Sheinin relating to meeting with Mr. Ewens, Q.C.;

014670-014681 McCarthy Tétrault to Mr. Vancoughnett, draft document, January 8, 1996;

014682-014684 McCarthy Tétrault, correspondence, January 12, 1996 to Mr. Brian Peets, Bayou Development Ltd. and Mr. Peter Lewis;

014685-014687 Memorandum from Mr. Ewens, Q.C. to Mr. Vancoughnett, January 12, 1999;

014689-014694 Internal McCarthy Tétrault Memorandum, January 13, 1996;

014712 Memorandum from Mr. Sheinin to file, January 22, 1996;

014713-014715 Memorandum from Mr. Ewens, Q.C. to representatives of the Applicants, January 29, 1996;

014716-014719 Correspondence from Mr. Ewens, Q.C. to Mr. Vancoughnett and Mr. Sheinin, February 2, 1996;

014722-014728 Communication to McCarthy Tétrault relative to transaction;

014734 Handwritten notes of Sandy Sheinin, February 3, 1996;

014735 Handwritten notes of Sandy Sheinin, February 3, 1996;

014736 Handwritten notes of Sandy Sheinin, March 3, 1996;

014738-014741 McCarthy Tétrault to Sheinin and Co., March 4, 1996;

014742 Sheinin and Co. to Mr. Ewens, March 5, 1996;

014743 Memo Sheinin and Co. to Mr. Ewens, March 5, 1996;

014747-014748 Communication from Chilcotin Plateau Minerals Inc. to Applicants' agents and McCarthy Tétrault;

014749-014754 Correspondence from McCarthy Tétrault relative to Beach Avenue Holding Company Ltd. subsidiary, February 7, 1996;

014755-014763 Correspondence from McCarthy Tétrault to Belgravia Investments Limited re: incorporation of subsidiary corporations, February 6, 1996;

014810-014814 Correspondence from McCarthy Tétrault to Sheinin and Co, December 10, 1997;

014843-014845 Correspondence from law firm for Applicants to Mr. Vancoughnett, May 8, 1996;

014846-14847 Correspondence from Tex Can, an Applicant, to lawyer, May 8, 1996;

014848-014853 Correspondence from lawyer to Tex Can May 13, 1996;

014854-014858 Correspondence from McCarthy Tétrault to 3225194 Canada Inc., formerly Tex Can Cables Limited and 3225216 Canada Inc.;

014861-014865 same as 014854-014858;

014867-014869 Memo from Sheinin and Co. to WNCLP Partners dated December 1, 1995 with attached schedules; although the Applicants in argument say that this is another inadvertent production, there is nothing in the evidence to support a claim for solicitor-client privilege in this document;

014877-014881 Letter dated March 7, 1996 to Beach Avenue Holding Company Ltd. and 512973 British Columbia Limited;

014929 Fax memo from Chilcotin Plateau Minerals Ltd. to Mr. Ewens, November 16, 1999;

- 014930-014938 Memorandum from Mr. Ewens, Q.C. to Keith Vancoughnett, November 19, 1999;
- 014940-014942 Memorandum from Mr. Ewens, Q.C., November 24, 1999;

[72] As for the documents that I have found not to be privileged, that conclusion is based on my assessment that those documents are business advice or mere statements of fact. These documents are otherwise producible pursuant to *Susan Hosiery, supra*, or because privilege has been waived following the involvement of third parties.

[73] The remaining documents are those which I have concluded, on the basis of the evidence and the documents themselves, do not support the assertion of solicitor-client privilege. These documents are the following:

- 013542-013547 Letter dated January 2, 1996 from Sheinin and Co. to J.E. Bowes Investments Inc., providing information about a proposed investment, including a term sheet;
- 013562-013568 Same letter January 2, 1996, to 409707 Alberta Limited;
- 013911-013919 Note dated January 3, 1996 from Supreme Graphics Limited and a letter dated January 2, 1996 to Res Publications Limited;
- 013937-013943 Letter January 2, 1996 to Supreme Graphics Limited;
- 013976-013980 Letter January 2, 1996 to Bow Ross Holdings Limited;
- 013985-013991 Letter January 2, 1996 to Space Fuel Gas Products Limited;
- 014273-014277 Term Sheet, Schedule and Letter dated January 5, 1996 from Sheinin and Co to J. Poole Holdings Limited;
- 014278-014284 Letter Dated January 2, 1996 from Sheinin and Co. to Space Fuel Gas Products Limited with attachments;

- 014394-014402 Fax cover sheet from Sheinin and Co. to Mr. Paul Bidaud, A.N.C. with attachments;
- 014487-014490 Memo from Sheinin and Co. to WNCLP Partners, December 1, 1995 with attachments;
- 014535-014541 Fax memorandum dated December 29, 1995 from Mr. Vancoughnett, Belgravia Investments Limited with attachments including a schedule at page 014537;
- 014542-014545 Fax cover sheet dated December 28, 1995 to Sandy Sheinin from Mr. Vancoughnett with attachments;
- 014667 Handwritten notes of Mr. Sheinin dated January 10, 1996 and which refer to the lawyer for Taseko so if there was privilege, privilege has been waived;
- 014733 Undated memo from Sheinin and Co. filed re: Taseko Resources;
- 014835 A schedule argued to be the product of legal advice but there is no evidence to support that assertion;
- 014870-014876 Letter from Sheinin and Co. to Space Fuel Gas Products Limited, January 2, 1996 with attachments;
- 014882-014886 Term sheet, schedule and letter to J. Poole Holdings Limited, January 5, 1996.

[74] In my opinion, the documents listed above do not satisfy any of the headings identified by the Applicants in their code. They appear to be documents prepared by accountants, as business men, for their clients, providing information about a proposed investment and setting out the terms of those transactions. These documents do not imply the receipt of legal advice or that they are the products of legal advice, and there is no evidence in the affidavits filed, including cross-examinations on those affidavits that these documents contain legal advice.

[75] Furthermore, there is nothing to support the assertion in the affidavit of Mr. Vancoughnett that these documents were created for the purpose of giving or obtaining legal advice for the WNCLP Partners or Investors Group. The documents listed above seem to be merely for the purpose of conveying information.

[76] From my review of the transcripts of cross-examinations it appears that Mr. Vancoughnett, Mr. Sheinin and Mr. Lewis carefully stated that they were not engaged for the provision of legal advice; that was the role of McCarthy Tétrault. Indeed, Mr. Sheinin and Mr. Lewis seem to say that they were not involved in the provision of any advice, including tax or accounting advice.

[77] There is nothing in the affidavits, including the cross-examinations, to establish an evidentiary basis for the assertion of solicitor-client privilege in the above named documents. Mr. Vancoughnett was specifically questioned as to whether he had inspected all of the documents in question. He answered to the effect that he had seen them all at some point but he was unable to offer further clarification in the course of his cross-examination on May 5, 2000. Mr. Vancoughnett acted on behalf of RES Publications Limited to retain McCarthy Tétrault in mid-October 1995 in connection with the transaction, but his evidence clearly states that the agency functions discharged by RES Publications Limited, on behalf of the Applicants, was not limited to obtaining legal advice from McCarthy Tétrault.

[78] The retainer of the lawyers for the purpose of legal advice does not cast solicitor-client privilege over documents which were created and distributed by RES, Chilcotin and Sheinin to the Applicants for business or accounting purposes, or merely for relaying the proposed terms of the transaction. The above list of non-privileged documents contains several versions of the January 2, 1996 letter from Sheinin and Co. to Applicants and some parties who are not Applicants, because they did not participate in the transactions. The letter of January 2, 1996 was produced in an expurgated version but the Applicants sought non-disclosure of a portion of page 1 of the letter and a schedule attached to the letter. It is unclear whether that schedule forms part of a term sheet which is referred to in the letter.

[79] The evidence is unclear as to the source of the term sheet; in the course of the cross-examination of Mr. Sheinin on May 5, 2000, counsel for the Applicants volunteered that the term sheet was drafted by McCarthy Tétrault in consultation with counsel for Taseko.

[80] When questioned about the source of the schedule, Mr. Sheinin testified that he did not know who had prepared it or where it came from. In my opinion, there is no evidence to support the unsworn commentary of counsel for the Applicants that this document reflects legal advice provided by McCarthy Tétrault.

[81] In these circumstances, it seems to me that there is no basis for the assertion of privilege in relation to that document and I find that it is subject to production.

[82] The letter of January 2 and this schedule were the subject of submissions about inadvertent production. Since I find that these documents are not privileged, it is unnecessary for me to address that argument.

[83] Next, there are those documents for which I find that if privilege existed, it has been waived on the basis that third parties were involved. Accordingly, there was a waiver of any expectation of confidentiality. These documents are the following:

002114-002119	Notes by McCarthy Tétrault lawyer of telephone conversations with an outside party;
003391-003392	Notes of telephone conversations involving third parties;
003595	Notes of telephone conversations involving third parties;
009886	Notes of telephone conversation with counsel for the bank;
009550	Notes of telephone conversation with counsel for the bank;
014667	Notes made by Mr. Sheinin of conversation with counsel for the parties and third parties.

[84] There is one final group of documents to be addressed, that is the expurgated documents. In the course of the hearing, counsel for the Applicants volunteered to produce certain pages which had been formerly extracted, as follows:

014027

014050

014051

014285

014411

014491

014500

014505

014513

014544

014546

014695

014744-014745

014766-014782

014815-014831

014833-014860

014866

014904-014906

014907-014918

[85] In conclusion, the documents identified as being subject to solicitor-client privilege are exempt from disclosure pursuant to section 232(5)(b)(i), including the documents recorded in Schedules "A" and "B" annexed to the Order filed herein. The documents which I have found not to be privileged will be disclosed. However, for the protection of the Applicants, all documents shall remain under seal and in the possession of the custodian until the expiry of the

applicable appeal period. The Applicants shall produce those documents which they offered to produce during the hearing.

[86] There will be no order as to costs.

“E. Heneghan”

J.F.C.C.

OTTAWA, Ontario
June 7, 2002

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-167-00

STYLE OF CAUSE: Belgravia Investments Limited et al. v. Her Majesty
the Queen

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: May 23, 2001

**REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE
HENEGHAN**

DATED: June 7, 2002

APPEARANCES:

Mr. Timothy Chick FOR APPLICANT
Mr. Douglas Ewens Q.C.
Ms. Deanna Kolivar

Mr. Robert Carvalho FOR RESPONDENT

SOLICITORS OF RECORD:

Mr. Timothy Chick FOR APPLICANT
Calgary, Alberta

Mr. Robert Carvalho FOR RESPONDENT
Vancouver, British Columbia