Federal Court  Cour fédérale

Date: 20121113

Docket: T-848-11

Citation: 2012 FC 1313

Ottawa, Ontario, November 13, 2012

PRESENT: THE CHIEF JUSTICE

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

GRANT THORNTON

Respondent

and

FOREMOST INDUSTRIES

Intervener(s)

REASONS FOR JUDGMENT AND JUDGMENT

[1] The central dispute in this case concerns whether three short documents are protected by solicitor client privilege [SCP].

[2] The Intervener has also challenged the constitutionality of the statutory provisions pursuant to which the Applicant seeks to compel the production of those documents, on the basis that that

they potentially permit the Minister to access documents that are protected by SCP, without the privilege-holder's knowledge or consent. The Intervener submits that such potential access to documents protected by SCP constitutes an unreasonable search and seizure, and thereby contravenes s. 8 of the *Canadian Charter of Rights and Freedoms*.

[3] The documents in question were either knowingly or inadvertently disclosed by the Intervener to its auditor, the Respondent, which did not participate in these proceedings.

[4] For the reasons that follow, I find that:

a. each of the three documents is protected by SCP; and

b. on the particular facts in this case, it is not necessary or appropriate to decide the constitutional question that has been raised.

I. Background

[5] The Canada Revenue Agency [CRA] is engaged in a review of the 2005 reorganization [Reorganization] of the Foremost Industries Income Fund [FIIF].

[6] Foremost Industries Inc., at all relevant times, acted as the administrator of FIIF.

[7] Following the Reorganization, FIIF ceased to exist, and Foremost Income Fund [Fund] was created. Foremost Industries Inc., at all relevant times in 2005 and 2006, was also the administrator of Fund. In 2006, the Intervener, Foremost Industries Ltd., became the new administrator of Fund, as successor to Foremost Industries Inc. Except where otherwise indicated below, the various entities referred to above will be collectively referred to as Foremost.

[8] Among other things, it appears that CRA is reviewing losses that were claimed by one of Fund's unit holders, which resulted from a complicated series of transactions that followed the Reorganization, and which apparently were unavailable to other unit holders.

[9] In a letter dated January 30, 2010, Mr. Craig Bell advised that he was the Secretary and General Counsel of FIIF, and director of the administrator of FIIF, before and at the time of the Reorganization. He further advised that he was the initial trustee of FIIF, and that he no longer serves Fund in any of the aforementioned capacities. In addition to being a member of the Law Society of Alberta, Mr. Bell has been a chartered accountant since 1988.

[10] The Respondent was retained as the auditor for FIIF and also performed some ancillary tax filing work for FIIF.

[11] Pursuant to subsections 231.1(1)(a) and (b) of the *Income Tax Act*, RSC 1985, C. 1 (5th Supp.) [ITA], CRA sent a letter dated December 2, 2010 to the Respondent notifying it that it was required to produce certain information and documents in relation to the Reorganization within 30 days of the date of the letter [the "Requirement Letter"]. That letter did not indicate the procedure to

be followed if any of the documents or other information falling within its scope [Documents and Information] were entitled to the protection of SCP. Indeed, that letter did not mention SCP whatsoever and was not copied to the Intervener.

[12] By letter dated December 22, 2010, CRA received a reply from the Respondent which provided some of the Documents and Information in response to the Requirement Letter. The Respondent also stated that it had been advised by FIIF that FIIF was asserting SCP over three documents [Retained Documents], which it identified as follows:

a. Memo to Trustees, October 31, 2005, Re: Transaction Backgrounder, 4 pages, by Craig Bell, CA LLP;
b. Memo to File, March 22, 2006, Re: T3 and Other Tax Considerations, 3 pages by Craig Bell, CA LLP;
c. Memo, untitled, undated, 3 pages, by Craig Bell, CA LLP.

[13] On March 28, 2011, Wendy Bridges, counsel to the Applicant, sent the Respondent a letter proposing the following two options to resolve the issue of whether or not the Retained Documents were protected by SCP:

a. proceedings pursuant to subsection to 237.7(1)(b) of the ITA, or
b. referral of the matter to a Department of Justice lawyer located outside Edmonton, for a non-binding opinion as to whether the Retained Documents are protected by SCP.

[14] The Respondent subsequently advised a representative of the Applicant by telephone that it elected to proceed with the first of those two options. In addition, Ronald J. Robinson, litigation counsel to Fund, became aware of Ms. Bridges' proposal and objected to it on the basis that it did not provide any role for the privilege holder in the process and was contrary to CRA's stated policy of obtaining information directly from taxpayers rather than from third parties.

[15] In May 2011, CRA filed a Notice of Application for a compliance order under subsection 231.7(1) solely against the Respondent, although it did serve a "courtesy copy" of that document on the Intervener. A few weeks later, the Intervener sought leave to intervene in these proceedings, which was granted on consent on June 15, 2011. One month later, the Intervener filed a Notice of Constitutional Question in respect of sections 231.2(1) and 231.7 of the ITA.

[16] At an initial hearing before me on August 16, 2011, a dispute as to whether the Intervener was entitled to raise its constitutional question without Leave of the Court was settled on consent. That consent was reflected in an Order dated September 7, 2011, which also revised the timetable for the hearing of this matter and the steps to be taken by the parties prior to that hearing.

II. Relevant Legislation

[17] The legislation relevant to this application is set forth in the ITA and is attached to these reasons as Appendix "A".

[18] In brief, subsection 231.2(1) permits the Minister, for any purpose related to the administration or enforcement of the ITA, to require any person to provide any information or any document within such reasonable period of time as stipulated in a written notice served in accordance with that provision. Pursuant to subsection 238(1), it is an offence to fail to comply with a requirement issued under section 231.2. That offence is punishable on summary conviction by (a) a fine of between $1,000 and $25,000, or (b) a fine in that range and imprisonment for a term not exceeding 12 months.

[19] Pursuant to subsection 231.7(1), on summary application by the Minister, a judge may, among other things, order a person to provide any information or documents sought by the Minister under section 231.2, if the judge is satisfied that:

> 1. the person was required under section 231.1 or 231.2 to provide the information or document and did not do so; and
> 2. the information or document is not protected from disclosure by SCP, as that term is defined in subsection 232(1).

III. Analysis

A. *Are the Documents protected by SCP?*

i. *Relevant legal principles*

[20] SCP has evolved from a rule of evidence into a substantive principle and a principle of fundamental justice (*Lavallee, Rackel & Heintz v Canada (Attorney General)* [2002] 3 SCR 209, at paras18 and 49 [*Lavallee*]). This principle protects not only the privacy interests of a person who

seeks legal advice, but also supports the integrity and fairness of our judicial system (*Lavallee*, above, at paras 36 and 49).

[21] At its core, and subject to very limited exceptions that either do not apply in this case or are discussed in Part III. A. (iii) below, this principle protects from disclosure (i) communications between a solicitor and his or her client, (ii) which entail the seeking or giving of legal advice, and (iii) which are intended to remain confidential (*Canada v Solosky* [1980] 1 SCR 821, at 837 [*Solosky*]).

[22] This protection is not confined to communications in which legal advice is provided. Rather, it extends to all communications "engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts" (*Miranda v Richer*, [2003] SCR 193, at para 30 [*Miranda*]). In brief, SCP protects all communications made within the framework of the solicitor-client relationship (*Descôteaux v Mierzwinski* [1982] 1 SCR 860, at para 71; *Canada (Privacy Commissioner) v Blood Tribe Department of Health* [2008] 2 SCR 574, at para 10 [*Blood Tribe*] ; *Samson Indian Band v Canada*, [1995] FCJ No 734, at para 8). However, communications made outside of that framework are not protected by SCP (*Solosky*, above, at 835). For example, SCP does not extend to purely business or policy advice that may be provided by a solicitor (*R v Campbell* [1999] 1 SCR 565, at para 50), or to documents that are not otherwise privileged and somehow come into the possession of a solicitor (*Belgravia Investments Ltd v Canada*, [2002 F.C.R. No. 870, at para 46 [*Belgravia*]).

[23] As acknowledged by the Applicant at the hearing of this Application on March 12, 2012, the foregoing applies with equal force to a solicitor's work product. That is to say, a solicitor's work product produced for the purpose of giving legal advice and intended to remain confidential is protected by SCP, (*Keefer Laundry Ltd v Pellerin Milnor Corp* [2006] BCJ No 1761, at paras 103-104 [*Keefer*]; *Susan Hoisery v Minister of National Revenue*, 69 DTC 5278, at 5282 [*Susan Hoisery*]). This is based on the theory that no one should be permitted to "look into the mind" of the lawyer as he or she is preparing a case (*Keefer*, above, at para 104). It is also entirely in keeping with the "broad and all-encompassing" approach to SCP (*Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, at para 16 [*Pritchard*]). However, while such work product itself is protected by SCP, facts that have an independent existence and do not arise "out of the solicitor-client relationship and of what transpires within it" are not so protected if they are otherwise discoverable (*Miranda*, above, at paras 30-32; *Belgravia*, above, at paras 44-45, quoting with approval *Susan Hoisery*, above).

[24] When an investigating authority comes into possession or otherwise becomes aware of a document or other information that may be protected by SCP, every effort should be made to contact the privilege holder, who should then be given a reasonable opportunity to (i) determine whether a claim of privilege should be asserted, (ii) make such assertion, if he or she decides to do so, and (iii) have the issue judicially decided, if the claim is contested. An investigating authority can only inspect the documents if and when it has been judicially determined that the documents are not protected by privilege (*Lavallee*, above, at para 49).

[25] Privilege does not come into being by an assertion of a privilege claim. It exists independently. In addition, the privilege belongs to the client and can only be asserted or waived by the client or through his or her informed consent (*Lavallee*, above, at para 39).

[26] The burden of proof rests on the person asserting SCP to establish that the information in question meets the necessary requirements (*Belgravia*, above, at para 47). However, once established, the onus is on the party seeking to overcome the privilege to establish that the information should be disclosed (*Smith v Jones*, [1999] 1 SCR 455, at para 46; *Camp Development Corp v South Coast Greater Vancouver Transportation Authority*, [2011] BCJ No9 104, at para 10 ; *Archean Energy*, above, at para 30; *Western Canada Place Ltd v Con-Force Products Ltd* [1997] AJ No 354, at para 18).

ii. *The Documents and SCP*

[27] From the outset of these proceedings, the Applicant has specifically maintained that the Minister is not seeking production of documents that are protected by SCP. However, the Applicant has emphasized that any of the Retained Documents that involve communications by Craig Bell in his capacity as trustee or accountant are not protected by SCP. Therefore, the Applicant took the position that if the Court was if the view that any of the Retained Documents may be entitled to the protection of SCP, the Respondent should produce those documents to the Court to enable the Court to determine the validity of the Intervener's assertion of SCP.

[28] Foremost took the position that it was not necessary for the Court to review the Retained Documents to determine whether they are protected by SCP, which it is asserting as administrator of

Fund and on behalf of Fund and other Foremost entities. In support of this position, it asserted that the uncontroverted evidence is that the Retained Documents are related to legal advice and not accounting advice or services.

[29] The "uncontroverted evidence" in question consisted of:

1. the "privilege" markings on the Retained Documents;

2. its assertion that the Retained Documents were created outside the limited time period in which Mr. Bell was a trustee of fund;

3. its assertion that Mr. Bell did not create the Retained Documents in his capacity as an accountant, and has never acted for Foremost in an accounting capacity;

4. its assertion that there is no evidence to suggest that Mr. Bell provided any accounting services whatsoever to Foremost, which has its own chief financial officer and a complement of accounting staff; and

5. its assertion that the Retained Documents relate to the provision of legal advice on the Reorganization, and not to the provision of advice on accounting matters.

[30] With respect to the markings on the Retained Documents, the word "PRIVILEGED" was typed at the top of the initial page of the first of the three documents. As to the second of those documents, the words "PRIVILEGED AND CONFIDENTIAL" were stamped at the bottom of each page. In addition, the following was stamped on each page: "The writer has been retained by Counsel to act on its behalf for the purposes of supporting legal advice in this matter." As to the third of the documents, the following words were typed at the top of the first page: "PRIVILEGED & CONFIDENTIAL – PREPARED UNDER EXPECTATION OF SOLICITOR & CLIENT PRIVILEGE".

[31] There may well be circumstances in which it is not necessary for the Court to review documents in respect of which a claim of privilege has been made, in order to determine whether they are protected by privilege. However, the evidentiary record in this case, as it existed at the time of the hearing on March 12, 2012, was not such as to enable me make that determination in respect of the Retained Documents. Accordingly, in a Direction issued on May 18, 2012, I stated that it was necessary for the Court to examine the documents to assess whether they are entitled to such protection (*Solosky*, above, at 837**;** *Risi Stone Ltd v Groupe Permacon Inc*, [1990] 3 FC 10, at para 4). I therefore directed the Respondent to file the Retained Documents under seal with the Court within 10 days, to permit a determination on the privilege issue to be made.

[32] In determining whether a document authored by a solicitor contains a communication that is protected by SCP, and in the absence of other evidence, it would ordinarily be appropriate to give substantial weight to the fact that the document is identified as being privileged. However, in this case, there was such other evidence, which included the following:

1. In addition to being a solicitor, Mr. Bell has been a chartered accountant since 1988;

2. One of the Retained Documents was undated, and may, notwithstanding Mr. Bell's representations to the contrary, have been prepared during the time that Mr. Bell was a trustee of FIIF;

3. Mr. Bell, who did not provide any evidence with respect to the Retained Documents, has advised numerous parties, including Mr. Pat Breen, "as to their respective governance roles, duties, responsibilities and liabilities" (Breen Affidavit, sworn on July 27, 2011, at para 11 [Breen Affidavit #2]). Mr. Breen has been the President and a Director of the Intervener since before the reorganization of FIIF into Fund.

4. Most importantly, Foremost had prior opportunities to identify and assert a claim of privilege in respect of the Retained Documents, yet failed to do so. This is reflected in Exhibit "D" to the Affidavit sworn by Mr. Breen on June 8, 2011 [Breen Affidavit #1], which includes a copy of a Service-Related Complaint that evidences a long and acrimonious series of exchanges, dating back to 2006, between Foremost and CRA regarding the reorganization. This was also confirmed during Foremost's cross-examination of Ms. Helen Little, a Team Leader in the Aggressive Tax Planning Section of the CRA (Cross-Examination on Affidavit of Helen Mary Little, December 8,

> 2011, at pages 15, 28, 38 and 42). Moreover, in oral submissions to the Court on March 12, 2012, counsel to the Applicant stated that Messrs. Breen and Bell were specifically requested to provide the information that was subsequently sought from the Respondent. In Response, counsel to Foremost simply observed that Mr. Bell received a "request letter" from CRA, rather than a "requirement letter," and that Mr. Bell was under no obligation to "self-identify privileged documents which are exempt from disclosure" under the ITA (Transcript, at 10 – 17).

[33] I have some difficulty with the suggestion that documents or other information that is within the scope of a request or requirement issued by CRA pursuant to the ITA may simply be withheld, without ever being identified on a privilege log, or otherwise, based on a view that the information is protected by SCP. Such a manner of proceeding would prevent the CRA or another regulatory authority in similar circumstances from ever being able to contest the assertion that the information in question is protected by SCP. Given that the party asserting SCP may well be wrong in that regard, it is essential that any information which falls within the scope of a request made pursuant to validly enacted legislation, and in respect of which a claim of SCP is asserted, be identified on a privilege log or in some other manner, so that the regulatory authority is aware of its existence and has an opportunity to challenge the assertion.

[34] Turning to three Retained Documents, the document dated October 31, 2005 is addressed to "Trustees" and is identified as a "Transaction Backgrounder". In Breen Affidavit #2, at para 14, Mr.

Breen stated that this "document was created for the trustees of the Fund (as client representatives and proposed trustees as of that date) on the legal aspects and considerations surrounding the Reorganization." This document is largely devoted to describing the structure, objectives and broad steps of the Reorganization. Towards the end, under the heading "Considerations," there is a reference to "counsel" having been sought in respect of certain issues that appear to be legal in nature, although there is no discussion of the specifics of any legal advice that may have been received. Taken alone, this suggests that the document may not have been prepared by Mr. Bell in his capacity as legal counsel. However, there is a subsequent general statement of belief that appears to convey a legal conclusion. This is followed by a second statement of belief regarding another legal issue. With the foregoing in mind, and given that a "broad and all-encompassing" approach should be taken to SCP (*Pritchard*, above, at para 16), I am inclined to err on the side of caution and conclude that this document is a protected communication that was (i) generated within the framework of a solicitor-client relationship, (ii) related to the giving of legal advice, and (iii) intended to be kept confidential, as evidenced by the word "PRIVILEGED" at the top of the first page. I note also that this document pre-dates the short period of time during which Mr. Bell was a trustee of Fund.

[35] The second of the Retained Documents, dated March 22, 2006, is a memorandum to "file," entitled "T3 and Other Tax Considerations." In Breen Affidavit #2, at para 15, Mr. Breen stated that he was advised by Mr. Bell "that the document was created by him to memorialize his legal analysis of certain aspects of the Reorganization and was the basis of legal advice provided to the Fund and its predecessor and related and affiliated entities." As with the document described immediately above, this document is largely descriptive. Generally speaking, it describes certain transactions that

appear to relate to the reorganization and then describes and their tax consequences for certain Foremost entities and other taxpayers. In several places, it is difficult to ascertain whether the statements made are based on accounting or legal considerations. However, once again, I decided to err on the side of caution and conclude that the document is protected by SCP, on the basis that it is work product which could well have been prepared by Mr. Bell in his capacity as a solicitor, and for the purpose of either providing legal advice to Foremost or assisting another solicitor to provide such advice. In reaching this conclusion, I also gave some weight to (i) Mr. Breen's evidence that, to the best of his knowledge, Mr. Bell "has never acted for the Fund or any of the Foremost entities in an accounting capacity", and (ii) the lengths to which Mr. Bell went to convey his view that the document is protected by SCP. As previously noted, that document is stamped "PRIVILEGED" in very large font at the top of each page, "PRIVILEGED AND CONFIDENTIAL" at the bottom of each page, and is stamped with the following statement on each page: "The writer has been retained by Counsel to act on its behalf for the purposes of supporting legal advice in this matter." With respect to this last statement, given that SCP also extends to documents created by a lawyer who has been consulted by another lawyer in the course of the latter's provision of legal advice to his or her client (*Belgravia*, above at para 50), the fact that Mr. Bell may not have been retained directly by Foremost, but rather by other counsel to Foremost, had no bearing on my determination. I should add that the lengths to which Mr. Bell went to convey his view that this document is protected by SCP satisfy me that the document was intended to remain confidential. In addition, I note that the document post-dates the short period during which Mr. Bell was a trustee of Fund.

[36] I also hasten to add that it is not necessary on the specific facts of this case to consider the potential relevance of the definition of SCP set forth in subsection 232(1) of the ITA, which, on its

face, is confined to "communications … passing between the person and the person's lawyer in professional confidence." This is because the Applicant has acknowledged that SCP extends to work product created in connection with the giving of legal advice, and it has also confirmed that it is not seeking access to any documents that are protected by SCP. In addition, Foremost has not questioned the scope of the definition of SCP in subsection 232(1), which is referred to in paragraph 231.7(1)(b). That said, I would observe in passing that "legislative language that may (if broadly construed) allow incursions on solicitor-client privilege must be interpreted restrictively" (*Blood Tribe*, above, at para 11).

[37] The third of the Retained Documents (the "Undated Memo") is undated and unaddressed. In Breen Affidavit #2, Mr. Breen stated that he was advised by Mr. Bell that he created the memo "in conjunction with the parties *[sic]* outside legal advisers at both Bennett Jones LLP and Blakes LLP in early 2006." Mr. Breen also stated that Mr. Bell advised him that "the document delineates legal analysis on the structure of the Reorganization" and "formed the basis of legal advice provided to the Fund and its predecessor and related and affiliated companies."

[38] As with the second of the Retained Documents, the Undated Memo contains no solicitor-client communication. Contrary to Mr. Breen's statement, it also does not appear to contain any legal analysis on the structure of the reorganization. This undermines Mr. Breen's assertion, which is hearsay, regarding the legal purpose of the memo, which is not otherwise immediately ascertainable. On its face, the document simply begins by stating certain historical facts and then briefly describes certain transactions that will occur prior to the Closing Date, as well as the various steps involved in the previously mentioned reorganization. The document ends by stating certain

"Final Balances" and referring to an unspecified "taxable capital gain/income." Given the foregoing, I initially concluded that this document is not protected by SCP.

[39] After conveying the above conclusions regarding the Retained Documents to counsel during a telephone conference on June 12, 2012, and inviting counsel to advise as to how they wished to proceed, counsel to the Intervener offered to provide further background information with respect to the creation and intent of the Undated Memo. I accepted that offer and issued a Direction, dated June 26, 2012, that set forth the dates by which such further information, and any response and reply that the Applicant and the Intervener, respectively, might wish to make, would have to be submitted.

[40] On July 5, 2012, the Intervener filed an Affidavit by Mr. Wallace Shaw, a member of the Law Society of Alberta and counsel with Blake Cassels & Graydon LLP. Based on the additional evidence set forth in that Affidavit, I am now satisfied that, as with the first two Retained Documents, the Undated Memo is also protected by SCP.

[41] In his affidavit, Mr. Shaw stated that he created the Undated Memo with Mr. Bell "while working with him to analyze the legal tax implications of various steps in the Reorganization." Among other things, he also stated that the document:

i. "was definitely not an accounting exercise";

ii. "was created to track the legal tax implications of steps in the Reorganization, which analysis I later communicated to my clients involved in the Reorganization"; and

iii. "was directly related to the provision of legal tax advice to my clients as well as Mr. Bell's".

[42] In contrast to Mr. Breen's hearsay evidence, Mr. Shaw's evidence is that of one of the authors of the Undated Memo, who is also an officer of the Court. In addition, Mr. Shaw's description of the contents of that document is more accurate and his description of their link to legal advice rings truer and is more persuasive than Mr. Breen's. It also corroborates Mr. Breen's evidence regarding the co-authorship of the document. In my view, Mr. Shaw's evidence warrants sufficient weight to tip the balance in favour of a conclusion that the Undated Memo is legal work product that is protected by SCP. In contrast to the term sheet that was discussed in *Belgravia*, above at para 78, and that was distributed to third parties for the purposes of "relaying the proposed terms of the transaction," I am satisfied that the Undated Memo was directly related to the provision of legal tax advice to Foremost and to Mr. Shaw's clients. I am also satisfied that this document was created for the purpose of providing such legal advice. Therefore, the fact that it does not appear to contain any legal thinking or analysis, and may even simply list facts that are otherwise discoverable, is not sufficient to deprive it of the protection afforded by SCP (*Universal Sales Ltd v Edinburgh*, 2009 FC 151, at para 22 [*Universal Sales*]).

[43] In addition, given that the authors of the Undated Memo inserted the words "PRIVILEGED AND CONFIDENTIAL – PREPARED UNDER THE EXPECTATION OF SOLICITOR &

CLIENT PRIVILEGE" at the top of the document, I am satisfied that they intended that the document be kept confidential.

[44] I have some sympathy with the Applicant's position that Mr. Bell, as the author of the first two Retained Documents and as one of the authors of the Undated Memo was best placed to provide evidence regarding those documents. However, given that he is also Foremost's counsel, I am not prepared to draw an adverse inference from the fact that he did not provide such evidence. (*Butterfield v. Canada (Attorney General)*, 2005 FC 396, at para 12). I agree with Foremost that there is now sufficient reliable evidence before the Court to enable me to determine that the Retained Documents are protected by SCP.

iii. Was there a Limited Waiver of SCP or an inadvertent disclosure of the Retained Documents?

[45] The Applicant submits that even if the Retained Documents were at one time protected by SCP, that privilege was waived when those documents were disclosed to the Respondent, Foremost's auditor.

[46] The Respondent was retained subsequent to the Reorganization of Fund, to audit Fund's financial statements.

[47] Documents that are protected by SCP and that are knowingly disclosed in confidence by the privilege holder to an auditor for the limited purpose of enabling the auditor to perform an audit and issue a fairness opinion retain such protection vis à vis other third parties, under the doctrine of limited waiver (*Interprovincial Pipe Line Inc and IPL Energy Inc v The Minister of National Revenue* ((1995), 95 DTC 5642, at 5646-7; *Anderson Exploration Ltd v Pan-Alberta Gas Ltd*, [1998] A.J. No 575, at paras 28-30 [*Anderson Exploration*]; *Philip Services Corp v Ontario Securities Commission,* [2005] OJ No 4418, at paras 47 and 57-58 [*Philip Services*]). It bears emphasizing that under this doctrine, the intention of the privilege holder is key.

[48] It also bears emphasizing that cases involving disclosure of privileged information to financial institutions are not particularly relevant to a consideration of the issue of limited waiver in the context of such disclosure to an auditor. In the latter context, there is a strong public interest in companies and other types of business organizations being properly audited, for the benefit of actual and potential shareholders or other members of the investing public, even where the disclosure of privileged information is not strictly mandated by statute (see, for example, *Philip Services*, above, at para 57). In furtherance of that public interest, the disclosure of privileged information that may reasonably be required by an auditor for the purposes of providing a fairness opinion will not be considered to constitute an unlimited waiver of SCP, when such disclosure is made in confidence and solely for that purpose.

[49] Unfortunately, neither the Applicant nor Foremost has adduced any evidence to establish how the documents came into the possession of the Respondent. However, Mr. Breen stated that (i) he is unaware of how the Respondent came into possession of the Retained Documents, (ii) none of

the Foremost entities, to his knowledge, voluntarily or knowingly provided those documents to the Respondent, and (iii) there was no intention to waive any SCP in those documents (Breen Affidavit #1, at para 18). During cross-examination on his affidavits, Mr. Breen added that (i) he had never seen the Retained Documents, (ii) he did not contact anyone in the Respondent's organization to inquire as to how the Retained Documents came into possession of those documents, and (iii) he was informed by CFO of Foremost, who was responsible for overseeing Foremost's dealings with its auditor (the Respondent), that he did not know how the Respondent came into the possession of those documents (Cross-Examination on Affidavits of Patrick Warren Breen, October 6, 2011, at pp. 20-21).

[50] In these circumstances, I am not satisfied that Foremost knowingly disclosed the Retained Documents to the Respondent for the limited purpose of enabling it to perform its audit, and with the intention of maintaining SCP over those documents for all other purposes. Indeed, Mr. Breen's evidence suggests that it is unlikely that Foremost did so. It follows that the limited waiver exception cannot be relied upon by Foremost to maintain the SCP in the Retained Documents. However, Foremost may still be able to maintain that SCP pursuant to the doctrine of inadvertent disclosure, discussed below.

[51] The Applicant further submits that any SCP which may have attached to the Undated Memo was waived when the contents of that document were presumably shared with the clients of Mr. Shaw, who stated in his affidavit that (i) he communicated his analysis to his "clients involved in the Reorganization" and (ii) the purpose of the Undated Memo was "directly related to the provision of legal tax advice to my clients." The Applicant also impugned Mr. Shaw's affidavit on

the basis that he failed to identify his client, to explain the nature of his involvement in creating the memo, and to explain the nature of the relationship between his clients and Foremost.

[52] In his affidavit, Mr. Shaw did in fact identify one of the "several entities" by whom he was retained, namely, TOM 2003-4 Income Fund. While his description of his involvement in the creation of the Undated Memo was somewhat vague, I am satisfied that he was a co-author of the document. As noted above, this was corroborated by Mr. Breen. In addition, this is implicit in his statement that the document "was created in conjunction with Craig Bell while working with him to analyze the legal tax implications of various steps in the Reorganization." I am also satisfied that he co-authored the document in his capacity as a solicitor to one or more entities involved in the Reorganization, and for the purpose of providing legal tax advice to those clients. This is clear from his statement quoted immediately above and his additional statements that "the document was created to track the legal tax implications of steps in the Reorganization" and that he communicated his analysis to his clients "involved in the Reorganization."

[53] In these circumstances, I am satisfied that the Undated Memo did not lose its privileged nature merely because it was co-authored by Mr. Shaw, a solicitor who did not represent Foremost, or because its contents were disclosed to his clients in the context of the provision of legal advice to them by him.

[54] It can be inferred from the fact that Messrs. Bell and Shaw co-authored the Undated Memo and then relied on that memo to provide legal tax advice to their respective clients that those clients

shared a common interest in completing the Reorganization in a manner that had certain tax consequences. It can also be inferred that Messrs. Bell and Shaw intended that their joint work product as set forth in Undated Memo would be used by each of them in providing advice to their respective clients, and that such work product was produced for the common benefit of their clients.

[55] There is no evidence that Mr. Bell, Mr. Shaw or their respective clients intended or anticipated that the Undated Memo would be disclosed to anyone who did not have a common interest in the completion of the Reorganization (*St. Joseph Corp v Canada (Public Works and Government Services)*, 2002 FCT 274, at para 79). Indeed, the insertion of the words "PRIVILEGED AND CONFIDENTIAL – PREPARED UNDER THE EXPECTATION OF SOLICITOR & CLIENT PRIVILEGE" at the top of the document make it readily apparent that Messrs. Bell and Shaw intended that the document remain confidential.

[56] There is also no evidence that the Undated Memo was disclosed to anyone who did not have a common interest in the completion of the reorganization.

[57] Given all of the foregoing, I am satisfied that the common interest exception to the rule that SCP is lost when the protected information is disclosed to a third party applies (*Pitney Bowes of Canada Ltd v Canada*, 2003 FCT 214, at paras 16-23; *Anderson Exploration*, above, at paras 21-27; *Almecon Industries Ltd v Anchortek Ltd*, [1999] 1 FC 507, at para 9; *Maximum Ventures Inc v De Graaf*, [2007] BCJ No 2355, at paras 14-16; *Archean Energy Limited and Titleist Energy Inc v The Minister of National Revenue* (1997), 98 DTC 6456, at para 30 [*Archean Energy*]). Accordingly, the

SCP attached to the Undated Memo was not waived due to the fact that Mr. Shaw participated in its creation or communicated all or part of the work product set forth in that document to his clients in the course of providing legal tax advice to them.

[58] This brings me to the doctrine of inadvertent disclosure.

[59] It appears to be settled now that the mere physical loss of custody of documents protected by SCP does not automatically result in the loss of the protection afforded by SCP (*Royal Bank of Canada v Lee*, [1992] AJ No 433, at p. 5).

[60] Indeed, one line of jurisprudence holds that SCP can only be waived through informed consent. (See, for example, *Metcalfe v Metcalfe*, [2001] MJ No 115, at para 14 (CA); and *Lavallee*, above, at para 36). To the extent that this jurisprudence stands for the proposition that inadvertent disclosure can never result in the loss of SCP, even, for example, where the privilege holder was negligent, careless, or failed to act promptly to assert SCP upon discovering the inadvertent disclosure, I do not endorse it.

[61] I prefer a second line of jurisprudence that holds that it is preferable to look at all of the circumstances of the case in determining whether to maintain SCP over documents that have been inadvertently disclosed (*Chapelstone Developments Inc v Canada*, [2004] NBJ No 450, at paras 46-55 (CA) [*Chapelstone*]; *Stevens v Canada*, [1998] FCJ No 794, at para 50 (FCA); *Armstrong v Canada (Attorney General)*, 2005 FC 1013, at para 23; *Brass v Canada*, 2011 FC 1102, at para 83

[*Brass*]; *Dublin v Montessori Jewish Day School of Toronto*, [2007] OJ No 1062, at paras 67-70; *S&K Processors v Campbell Avenue Herring Producers Ltd* [1983] BCJ No 1499, at para 6 (BCSC); *Maximum Ventures Inc v de Graaf*, [2007] BCJ No 1784, at para 40; *Toronto Port Authority v Toronto (City)*, [2008] OJ 5274, at paras 30-32;).

[62] This second line of jurisprudence has identified numerous factors to be considered by a Court in determining whether to exercise its discretion to maintain SCP over documents that have been inadvertently disclosed.

[63] One such factor is whether the privilege holder took swift steps to assert SCP upon learning of the inadvertent disclosure of privileged documents (*Chapelstone*, above, at para 55; *Universal Sales*, above, at para 31; *Pacific Northwest Herb Corp v Thompson*, [1999] BCJ No 2772, at paras 21-23). In the case at bar, there is no evidence that Foremost was aware that the Retained Documents had been inadvertently disclosed to the Respondent, or that it remained silent or did not take immediate action to assert SCP once it became aware of that disclosure. Indeed, the opposite appears to be true. Foremost seems to have learned that the Applicant was contesting the Respondent's assertion of SCP over the Retained Documents when Mr. Bell was copied on the Applicant's letter to the Respondent dated March 28, 2011. Two weeks later, on April 14, 2011, Foremost's outside litigation counsel (Mr. Robinson) wrote to the CRA to insist that the CRA's efforts to achieve a resolution regarding the privilege claim that had been asserted by the Respondent be henceforth directed to him, rather than the Respondent. Foremost then promptly sought intervener status in these proceedings for the explicit purpose of defending its SCP in the

Retained Documents. In my view, these actions by Foremost weigh in favour of exercising the Court's discretion to maintain SCP over the Retained Documents.

[64] A number of additional factors to be considered by a Court in determining whether to exercise discretion to maintain privilege over inadvertently disclosed documents were identified by Wein J. in *Airst v Airst*, [1998] OJ No 2615, at paras18-19 [*Airst*]. These are:

i. the way in which the documents came to be released;

ii. the timing of the discovery of the disclosure;

iii. the timing of the application to recover the documents;

iv. the number and nature of the third parties who have become aware of the documents;

v. whether the maintenance of the privilege will create an actual or perceived unfairness to the opposing party; and

vi. the impact on the fairness, both actual and perceived, of the processes of the Court.

[65] With respect to the manner of release of the documents, Wein J. suggested that admission of the disclosed documents into evidence may be appropriate where the disclosure occurred through the carelessness of the party claiming privilege, as opposed to through any wrongdoing of the opposing party. In the present case, there is no evidence to suggest such carelessness or wrongdoing.

[66] Wein J. also suggested that it may be appropriate to admit inadvertently disclosed documents where a failure to do so could leave a party with a sense that the Court was denying itself the opportunity to assess conflicting information on a material point, and consequently could negatively reflect on the public perception of the administration of justice. That consideration is not a factor in the case at bar, as I would not be depriving myself of an opportunity to assess conflicting information on a material point, if I were to maintain the SCP in the Retained Documents.

[67] In addition, Wein J. observed that in other cases, the information might have become so widely distributed that it would be futile as a practical matter to attempt to prevent its admission into Court. Once again, that is not a relevant consideration in the case at bar, as there is no evidence that the Retained Documents have been disclosed to anyone other than the Respondent and the clients of Messrs. Bell and Shaw. On the contrary, the record suggests that the inadvertent disclosure was limited to the Respondent, who appears to have obtained the documents in the context of an auditor-client relationship.

[68] Ultimately, Wein J. exercised his discretion to maintain SCP over the documents in question in *Airst* , above, after finding that the disclosure was limited in scope and restricted to one individual who had been retained in a capacity that might be broadly construed as confidential. In reaching this conclusion, Wein J. added that the Court's ability to assess facts underlying the issues in the case would not be impaired by the lack of disclosure. In the case at bar, each of these factors weighs in favour of the exercise of my discretion to maintain SCP over the Retained Documents.

[69] In *Brass*, above, at paras 86-91, Prothonotary Lafrenière of this Court exercised his discretion to maintain SCP in respect of inadvertently disclosed documents, primarily on the basis that (i) the party asserting SCP reacted quickly upon discovering its inadvertent production of privileged documents to the other party in the litigation, (ii) the party asserting privilege would have suffered significant prejudice if the SCP were not maintained, whereas the other party would suffer little prejudice if that occurred, and (iii) there was no evidence that the privilege holder had intended to waive its privilege. In the course of reaching that conclusion, Prothonotary Lafrenière observed that prejudice is more easily made out where the privilege at issue is SCP. I agree, and find that the considerations upon which he relied in reaching his conclusion also weigh in favour of exercising my discretion to maintain SCP in respect of the Retained Documents.

[70] In addition to the foregoing, the Applicant has not been able to establish that it would suffer any prejudice if SCP were maintained over the Retained Documents in the circumstances of this case.

[71] As to the fairness and truth seeking functions of the Court, given that the principle issue in these proceedings is whether the Retained Documents are protected by SCP, I am not satisfied that this consider merits significant weight in the Applicant's favour in this particular case.

[72] In its oral submissions, the Applicant essentially suggested that I should give negative weight to the fact that (i) Mr. Breen did not contact the Respondent to ascertain how it obtained the

Retained Documents, and (ii) Foremost did not adduce evidence with respect to the various factors that are relevant to the Court's determination of whether to exercise its discretion to maintain SCP in respect of the Retained Documents. I am sympathetic to this position, and have therefore given some negative weight to these considerations.

[73] However, given the other factors that I have discussed above, and, most importantly, given the fact that the Retained Documents appear to have been inadvertently disclosed to Foremost's auditor, a party with whom Foremost implicitly had a relationship of confidence, I am inclined to exercise my discretion in favour of maintaining SCP in respect of the Retained Documents. In my view, in the absence of any evidence whatsoever to suggest otherwise, it can be inferred that the Respondent came into possession of the Retained Documents in confidence, in the course of conducting its audit of Foremost.

iv. Conclusion regarding the Retained Documents

[74] For the reasons set forth above, I find that the Retained Documents:

i. are protected by SCP;

ii. were not knowingly disclosed to the Respondent pursuant to an express or implied limited waiver of privilege; and

iii. were inadvertently disclosed to the Respondent in circumstances which, considered together with the actions taken by Foremost to swiftly assert SCP in relation to the

Retained Documents upon discovering such disclosure, warrant the exercise of the Court's discretion to maintain SCP in respect of those documents.

B. *The Constitutional issue*

[75] Foremost has requested this Court to declare sections 231.2 and 237.1 of the ITA unconstitutional, on the basis that they potentially permit the Minister to access documents that are protected by SCP, without the privilege-holder's knowledge or consent. Foremost asserts that this constitutes an unreasonable search and seizure, contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*.

[76] I agree with the Applicant that this is not an appropriate case for the Court to make a determination on the question of the constitutionality of sections 231.2 and 237.1 of the ITA. In short, the allegedly unconstitutional fact scenario identified by Foremost did not arise in this case and remains somewhat hypothetical.

[77] In this case, Foremost was served a copy (albeit on a "courtesy" basis) of the Applicant's Notice of Application for a compliance order against the Respondent under subsection 231.7(1). Indeed, it was also copied on a letter dated March 28, 2011 from the Applicant to the Respondent, which proposed two alternatives for addressing the privilege issue that the Respondent raised in respect of the Retained Documents. These communications quickly led Foremost to seek intervener status in this proceeding, which ultimately was granted on consent. Foremost then availed itself of its opportunity to vigorously defend its interest in maintaining SCP in the Retained Documents. After considering the written and oral submissions made by the Applicant and Foremost, I

ultimately determined that each of the Retained Documents were and remain protected by SCP. As a result, the Applicant will not, in fact, obtain access to any privileged information, and there is certainly no issue of such access being obtained without the privilege holder's knowledge or consent.

[78] In these circumstances, it is unnecessary, and would not be appropriate, for the Court to address the constitutional question raised by Foremost. That issue can be revisited if and when a more appropriate factual matrix presents itself (*Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, at para 6; *Apotex Inc v Astrazeneca Canada Inc*, 2012 FC 559, at paras 69 and 70; *Duitama Gomez v Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 593, at paras 71-74; *Suescan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 438, at paras 26-28; *Bedada v Canada (Solicitor General)*, 2007 FC 121, at paras 16-20; *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45, at paras 40 and 57-58; *Canada (Minister of National Revenue) v Welton Parent Inc*, 2006 FC 67, at paras 123, 149-150, and 178-179; *Canada (Information Commissioner) v Canadian Transportation Accident Investigation & Safety Board*, 2005 FC 384, at paras 67-75; *Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1503, at para 111).

[79] *Chambre des notaires du Québec c Canada (Procureur général)*, 2010 QCCS 4215, [2010] JQ 8868, is distinguishable, as it involved requirements letters issued by the CRA to a number of lawyers. It also involved certain issues that do not arise on the facts of this case, particularly with respect to subsection 232 (1) of the ITA and the Quebec *Charter of Human Rights and Freedoms*, RSQ, c C-12.

IV. Costs

[80] Foremost submitted that it should be granted full indemnification costs for its intervention, on the ground that it should have been named as the Respondent in Notice of Application filed by the Applicant in these proceedings, in which the Applicant sought production of the Retained Documents. It further submitted that the Applicant's tactics in seeking access to privileged documents from a third party, rather than the privilege holder, should be soundly discouraged.

[81] In my view, the situation is much more nuanced than suggested by Foremost.

[82] As previously discussed in these reasons, Foremost and its trustees had numerous opportunities to identify and claim SCP in respect of the Retained Documents. At no time did they do so. The documents only came to light on December 22, 2010, when they were identified by the Respondent, in its response to the Applicant's requirements letter. In these circumstances, I am sympathetic to the Applicant's position that the appropriate respondent in this proceeding was Grant Thornton, the entity which was known to have possession of the Retained Documents, as opposed to Foremost, an entity that had never disclosed the existence of those documents and that might well not have possession of the originals or copies of those documents. That said, the Applicant may have been able to avoid the costs associated with these proceedings had it availed itself of Foremost's request to discuss the issue of whether the Retained Documents were protected by SCP, directly with Foremost.

[83] In its own attempt to find an expeditious resolution to the issue of whether the Retained Documents were in fact protected by SCP, the Applicant proposed to the Respondent, in a letter dated March 28, 2011 that was copied to Foremost, that this narrow issue be referred to the Court for a determination. Neither the Respondent nor Foremost availed itself of that opportunity. In fact, even during the hearing of this matter in March 2012, Foremost resisted the suggestion that the Court review the Retained Documents to determine whether they are protected by SCP. Foremost also continued to press the constitutional issue it had raised, even after the Applicant made clear that it did not want access to any documents that the Court might determine are protected by SCP, and even after I reminded Foremost's counsel of this during the hearing.

[84] Moreover, Foremost curiously made no effort whatsoever to contact the Respondent to find out how the Retained Documents came into the Respondent's position. The Applicant also made no such effort. This left the Court in a much more difficult position when addressing the submissions made by Foremost with respect to the issues of limited waiver and inadvertent disclosure. In addition, by leading its evidence with respect to the Retained Documents through Mr. Breen, whose only information about those documents came from Mr. Bell, Foremost made it very difficult for the Applicant to conduct a meaningful cross-examination with respect to those documents.

[85] In these circumstances, and given the findings that I have made on the issue of limited waiver and on the constitutional issue, I have determined that there should be no cost award made in this proceeding.

V. Conclusion

[86] The Retained Documents are protected by SCP. Accordingly, this Application is dismissed.

[87] As to the constitutional issue raised by Foremost, this is not an appropriate case for the Court to make a determination, because the allegedly unconstitutional fact scenario identified by Foremost did not arise on the particular facts of this case and remains somewhat hypothetical.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. this Application is dismissed;
2. this is not an appropriate case in which to make a determination on the constitutional issue raised by Foremost; and
3. there shall be no award of costs.

"Paul S. Crampton"

Chief Justice

APPENDIX "A"

Relevant Legislation

***Income Tax Act*, RSC 1985, C. 1 (5th Supp.)**

Requirement to provide documents or information

231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a comprehensive tax information exchange agreement between Canada and another country or jurisdiction that is in force and has effect or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as stipulated in the notice,

(*a*) any information or additional information, including a return of income or a supplementary return; or

(*b*) any document.

Production de documents ou fourniture de renseignements

231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord général d'échange de renseignements fiscaux entre le Canada et un autre pays ou territoire qui est en vigueur et s'applique ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :

a) qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;

b) qu'elle produise des documents.

Compliance order

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(*a*) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

Ordonnance

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

(*b*) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

Marginal note: Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Marginal note: Judge may impose conditions

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

Marginal note: Contempt of court

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Marginal note: Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

NOTE: Application provisions are not included in the consolidated text;

see relevant amending Acts. 2001, c. 17, s. 183.

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

Note marginale : Avis

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

Note marginale : Conditions

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

Note marginale : Outrage

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

Note marginale : Appel

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

NOTE : Les dispositions d'application ne sont pas incluses dans la présente codification;

voir les lois modificatives appropriées. 2001, ch. 17, art. 183.

Federal Court  Cour fédérale

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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