Citation: Tower v. M.N.R. (F.C.A.), 2003 FCA 307, [2004] 1 F.C.R. 183
Date: July 22, 2003
Docket: A-555-02

Printer Friendly Page

A-555-02

2003 FCA 307

The Minister of National Revenue (*Appellant*)

v.

Bruce Kitsch, Leslie Tower, Robert Tower and **BDO Dunwoody LLP** (*Respondents*)

Indexed as: Tower v. M.N.R. (F.C.A.)

Federal Court of Appeal, Létourneau, Sharlow and Malone JJ.A.--Vancouver, June 24; Ottawa, July 22, 2003.

Income Tax -- Practice -- On advice of accountant, taxpayers entering transactions to produce interest expense deductions -- M.N.R. issuing two requirements to accounting firm to provide tax files, tax planning documents, written responses to questions under Income Tax Act, s. 231.2(1) -- Applications Judge ordering compliance with requirements except parts requiring written responses or creation of new documents -- S. 231.2(1)(b) providing Minister with power to compel production of "any document" -- Minister entitled to compel production of documents, records under s. 231.2(1)(b), to ask questions to elicit knowledge, facts under s. 231.2(1)(a) which permits Minister to compel production of "information" -- Taxpayers' accountants having no right of redaction with respect to documents subject of requirements as no evidence of third party information therein -- As requested information may be relevant to tax liability requirements issued for purpose of administration, enforcement of Act.

Practice -- Privilege -- Whether material prepared by accountants for purpose of providing tax advice privileged communications -- "Class" privilege , "case-by-case" privilege discussed -- Solicitor-client privilege rooted in proper administration of justice -- Advice given by tax accountants not elevated to level of solicitor-client privilege -- As disputed communications not meeting Wigmore's four principles set out in treatise on evidence, not covered by case-by-case privilege.

Construction of Statutes -- Income Tax Act, s. 231.2(1) -- S. 231.2(1)(a) giving Minister power to compel production of «information»; s. 231.(1)(b) giving power to compel production of «any document» -- Presumption against redundancy and every word in statute presumed to make sense, play specific role in advancing legislative purpose -- Different interpretation must be given to both paragraphs, and different meanings given to «information», «document» -- «Information» meaning knowledge or facts -- To exercise power, Minister must be able to ask questions to elicit knowledge, facts, figures.

These were an appeal and a cross-appeal from a Trial Division order allowing in part an application for judicial review of two decisions of the Minister of National Revenue to issue two "requirements to provide information" under subsection 231.2(1) of the *Income Tax Act*. The

taxpayers were businessmen who decided, in 1997, to emigrate from Canada and give up their Canadian residency. After consultation with a chartered accountant from BDO Dunwoody, they entered into transactions intended to produce interest expense deductions that would offset the taxable income expected to arise when they ceased to be residents of Canada in 1998. The taxpayers each negotiated separate loans with Canadian Imperial Bank of Commerce and claimed deductions for the interest expenses associated with those loans in their 1997 and 1998 income tax returns. In an initial assessment of the taxpayers' 1997 taxation years, the Minister allowed their interest deductions. By letters dated May 12, 2000, the Minister requested from the taxpayers information regarding their 1997 and 1998 tax deductions. Dunwoody responded on their behalf but certain information requested was not supplied. Subsequently, the Minister reassessed the taxpayers and disallowed the interest deductions. Meanwhile, on July 11 and 18, 2001, the Minister required Dunwoody to deliver up all the tax files, tax planning documents and all of the files relating to the taxpayers, and to provide written responses to certain questions. The Applications Judge ordered the taxpayers to comply with the Minister's requirements, except for those parts which required written responses to questions or which compelled Dunwoody to create new documents, as these latter demands were said to be outside the scope of subsection 231.2(1) of the Act. Two issues were raised on appeal: (1) whether subsection 231.2(1) allows Dunwoody to refuse to answer the Minister's written questions or to create new documents; and (2) whether subsection 231.2(1) permits Dunwoody to remove confidential references and information in respect of persons other than the taxpayers from the documents to be delivered in response to the Minister's requirements. Two more issues were raised on cross-appeal: (3) whether the requirements were issued for the purpose of the administration and enforcement of the Act within the meaning of section 231.2; and (4) whether certain of the requested material prepared by Dunwoody for the purpose of providing tax advice to the taxpayers was privileged.

Held, the appeal should be allowed and the cross-appeal should be dismissed.

(1) The Applications Judge erred in his interpretation of subsection 231.2(1) by failing to give a meaning to paragraph 231.2(1)(*a*). In statutory interpretation there is a presumption against redundancy. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. This principle dictates that meaning must be given to both paragraphs (*a*) and (*b*) of subsection 231.2(1), and unless there is a good reason to the contrary, a different interpretation must be given to both paragraphs, and different meanings to the words "information" and "document". Paragraph 231.2(1)(*b*) provides the Minister with the power to compel production of "any document". The word "document", as used in the Act, is not restricted to writings. It is defined in section 231 as including "money, a security and a record". Paragraph 231.2(1)(*a*), when properly interpreted, empowers the Minister to compel a taxpayer to provide "information", meaning knowledge or facts. In order to exercise this power, the Minister must be able to ask questions to elicit the knowledge, facts or figures. The words used in paragraph (*a*) enable the Minister not only to get the information regarding a taxpayer's income, but also to specify the form in which this information must be provided. The Minister was therefore able to compel production of documents and records under paragraph 231.2(1)(*b*) and ask questions to elicit knowledge or facts under paragraph 231.2(1)(*a*).

(2) The Applications Judge gave Dunwoody permission to redact such names or information from the material if it became necessary to protect confidential third party information. However, once Dunwoody assembled the required documents, it was discovered that there was nothing to be redacted. The record before the Applications Judge contained no evidence that there was any third party information in any of the documents that were the subject of the requirements. The Applications Judge therefore erred in stating that Dunwoody had a right of redaction with respect to the documents in question. He should instead have concluded that Dunwoody had failed to establish any factual basis for asserting such a right.

(3) The requirements were intended to test the taxpayers' entitlement to the interest deduction which depends upon whether the statutory conditions in paragraph 20(1)(*c*) of the *Income Tax Act* are met, and if not, whether the general anti-avoidance rule in subsection 245(2) applies. The determination of a taxpayer's liability is a purpose related to the administration and enforcement of the Act. A requirement is valid if the requested information may be relevant in the determination of the tax liability of the named taxpayer. The information which the taxpayers objected to producing could be relevant to determining their tax liability under the Act. The Applications Judge correctly determined that the requirements were issued for the purpose of the administration and enforcement of the Act.

(4) The last issue was whether tax memoranda, notes of tax advice or other documents which set out the tax advice given by a tax accountant to a client are privileged communications. The Supreme Court of Canada has recognized two types of legal privilege: "class" privilege and "case-by-case" privilege. Solicitor-client privilege is rooted in the proper administration of justice. Lawyers are legally and ethically required to uphold and protect the public interest in the administration of justice; accountants are not so bound. No overriding policy consideration exits so as to elevate the advice given by tax accountants to the level of solicitor-client privilege. A principled approach to the question of case-by-case privilege should always be employed, taking into account each of the four factors set out by Professor Wigmore in his American treatise on evidence, and the particular circumstances of each case. According to the first Wigmore principle, the communications must originate with an expectation of confidentiality. Dunwoody and the taxpayers did not discharge their onus of showing that the relationship in issue carried with it an expectation of confidentiality sufficient to meet the first Wigmore principle. The taxpayers also did not show that confidentiality was essential to the full and satisfactory maintenance of their relationship with their tax accountant so as to satisfy Wigmore's second principle. Confidentiality may be desired, as with all personal and professional relationships, but the relationships here did not depend on confidentiality for their existence. Further, the taxpayers did not show that the tax accountant-client relationship is one that in the opinion of the community ought to be sedulously fostered to the degree that would attract privilege. Such relationship is not as fundamental to society and the administration of justice as the solicitor-client relationship. In considering the fourth Wigmore principle, it must be determined whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the matter. The balancing of the injury to the relationship against the benefit of the correct disposal of the matter involves purely public policy considerations. The taxpayers did not show that any public injury would occur should these tax accountant-client communications continue to be subject to review by the Minister. If such communications are subject to the spectre of case-by-case privilege, the harm done to the verification and enforcement of the Act would be considerable and would outweigh whatever injury done to tax accountant-client relationships. Overall, the balancing of public interests favoured disclosure. The disputed communications did not meet any of Wigmore's four principles and were therefore not covered by case-by-case privilege.

statutes and regulations judicially

considered

Income Tax Act, R.S.C., 1985 (5th Supp.), c. 1, ss. 20(1)(*c*) (as am. by S.C. 1994, c. 7, Sch. II, s. 15), 231 "document" (as am. by S.C. 1998, c. 19, s. 228), 231.2(1) (as am. by S.C. 2000, c. 30, s. 176), 245(2), 248(1) "record" (as enacted by S.C. 1998, c. 19, s. 239).

Income Tax Act, S.C. 1970-71-72, c. 63, s. 231.3 (as am. by S.C. 1986, c. 6, s. 121).

Internal Revenu code, 26 USC § 7525 (1986).

Tax Court of Canada Rules (General Procedure), SOR/90-688.

cases judicially considered

applied:

AGT Ltd. v. Canada (Attorney General), [1997] 2 F.C. 878; [1997] 2 C.T.C. 275; (1997), 97 DTC 5189; 211 N.R. 220 (C.A.); *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388; (1991), 85 D.L.R. (4th) 88; [1992] 1 W.W.R. 193; 8 C.B.R. (3d) 121; 76 Man. R. (2d) 1; 131 N.R. 81; 10 W.A.C. 1; *Baron v. Canada*, [1991] 1 F.C. 688; [1991] 1 C.T.C. 125; (1991), 91 DTC 5055; 122 N.R. 47 (C.A.); *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; (1997), 143 D.L.R. (4th) 1; [1997] 4 W.W.R. 1; 85 B.C.A.C. 81; 29 B.C.L.R. (3d) 133; 34 C.C.L.T. (2d) 1; 8 C.P.C. (4th) 1; 4 C.R. (5th) 220; 42 C.R.R. (2d) 37; 207 N.R. 81.

referred to:

Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342; (1989), 57 D.L.R. (4th) 231; [1989] 3 W.W.R. 97; 75 Sask. R. 82; 47 C.C.C. (3d) 1; 33 C.P.C. (2d) 105; 38 C.R.R. 232; 92 N.R. 110; *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729; (1962), 35 D.L.R. (2d) 49; 62 DTC 1236; *James Richardson & Sons, Ltd. v. Minister of National Revenue et al.*, [1984] 1 S.C.R. 614; (1984), 9 D.L.R. (4th) 1; [1984] 4 W.W.R. 577; 7 Admin. L.R. 302; [1984] CTC 345; (1984), 84 DTC 6325; 54 N.R. 241; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; (1990), 68 D.L.R. (4th) 568; 55 C.C.C. (3d) 530; [1990] 2 C.T.C. 103; 76 C.R. (3d) 283; 47 C.R.R. 151; 90 DTC 6243; 106 N.R. 385; 39 O.A.C. 385; *R. v. Jarvis*, [2002] 3 S.C.R. 757; (2002), 317 A.R. 1; 219 D.L.R. (4th) 233; [2003] 3 W.W.R. 197; 8 Alta. L.R. (4th) 1; 169 C.C.C. (3d) 1; 6 C.R. (6th) 23; [2003] 1 C.T.C. 135; 101 C.R.R. (2d) 35; 2002 DTC 7547; 295 N.R. 201; *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082; (2001), 204 D.L.R. (4th) 590; [2002] 1 C.T.C. 95; 2001 DTC 5505; 275 N.R. 90; *Fraser Milner Casgrain v. M.N.R.*, [2002] 4 C.T.C. 210; 2002 DTC 7310; (2002), 223 F.T.R. 23 (F.C.T.D.); *Imperial Oil Ltd. v. Canada*, 2003 DTC 5485 (F.C.A.); *R. v. Gruenke*, [1991] 3 S.C.R. 263; [1991] 6 W.W.R. 673; (1991), 67 C.C.C. (3d) 289; 8 C.R. (4th) 368; 7 C.R.R. (2d) 108; 75 Man. R. (2d) 112; 130 N.R. 161; 6 W.A.C. 112; *R. v. McClure*, [2001] 1 S.C.R. 445; (2001), 195 D.L.R. (4th) 513; 151 C.C.C. (3d) 321; 40 C.R. (5th) 1; 266 N.R. 275; 142 O.A.C. 201; *Fortin v. Chrétien*, [2001] 2 S.C.R. 500; (2000), 201 D.L.R. (4th) 223; 272 N.R. 359.

authors cited

Collins Robert Unabridged French-English, English-French Dictionary, 5th ed. New York: HarperCollins; Paris: Dictionnaires Le Robert, 1998 "*renseignement*".

Concise Oxford English Dictionary, 10th ed. Oxford: Oxford Univ. Press, 2002, "document", "information".

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham: Butterworths, 2002.

Wigmore, John Henry. *Evidence in Trials at Common Law*, McNaughton Revision, Vol. 8. Boston: Little, Brown & Co., 1961.

appearances:

Robert Carvalho and *Ron D. F. Wilhelm* for appellant.

Joel A. Nitikman for respondents.

solicitors of record:

Deputy Attorney General of Canada for appellant.

Fraser Milner Casgrain LLP, Vancouver, for respondents.

The following are the reasons for judgment rendered in English by

Malone J.A.:

Introduction

[1]This appeal and cross-appeal arise from an order of a judge of the Federal Court, Trial Division (the Applications Judge) dated September 3, 2002, which allowed, in part, an application for judicial review of two decisions of the Minister of National Revenue (the Minister) to issue two "requirements to provide information" (requirements). These requirements were issued pursuant to subsection 231.2(1) [as am. by S.C. 2000, c. 30, s. 176] of the *Income Tax Act*, R.S.C., 1985 (5th Supp.), c. 1 (the Act). Reasons in support of this order are reported as *Tower v. M.N.R.*, [2003] 2 F.C. 146 (T.D.).

[2]In his requirements, dated July 11 and July 18, 2001, the Minister required BDO Dunwoody (Dunwoody), the accountants for Bruce Kitsch, Leslie Tower and Robert Tower (the taxpayers) to deliver up all the tax files, tax planning documents and all of the files relating to the taxpayers, and to provide written responses to certain questions. The Applications Judge ordered the taxpayers to comply with the Minister's requirements, except for those parts which required written responses to questions, or which compelled Dunwoody to create new documents; these latter demands being said to be outside the scope of subsection 231.2(1).

[3]Subsection 231.2(1) of the Act provides authority for the Minister to issue requirements. It reads:

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, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

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

(*b*) any document. [Emphasis added.]

Issues

[4]Various errors of law are alleged in the appeal and cross-appeal. In brief, these are the issues:

On Appeal

(a) does subsection 231.2(1) allow Dunwoody to refuse to answer the Minister's written questions or to create new documents?

(b) does subsection 231.2(1) permit Dunwoody to redact, that is, remove, confidential references and information in respect of persons other than the taxpayers from the documents to be delivered in response to the Minister's requirements?

On Cross-appeal

(c) were the requirements issued for the purpose of the administration and enforcement of the Act within the meaning of section 231.2?

(d) was certain of the requested material that was prepared by Dunwoody for the purpose of providing tax advice to the taxpayers privileged?

Facts

[5]The taxpayers were businessmen who decided, in 1997, to emigrate from Canada and give up their Canadian residency. They informed their accountants, Dunwoody in Kelowna, British Columbia, of their intention and were referred to Jas Butalia, a chartered accountant with the

Calgary office of Dunwoody, who specializes in income tax matters.

[6]As a result of their discussions with Mr. Butalia, the taxpayers entered into transactions that apparently were intended to produce interest expense deductions that would offset the taxable income expected to arise when the taxpayers ceased to be residents of Canada in 1998.

[7]The taxpayers each negotiated separate loans with Canadian Imperial Bank of Commerce (CIBC) in amounts ranging from US$50 million to $100 million. In their 1997 and 1998 income tax returns, the taxpayers claimed deductions for the interest expenses associated with those loans.

[8]The Minister's initial assessment of the taxpayers' 1997 taxation years allowed the taxpayers their claimed interest deductions.

[9]By letters dated May 12, 2000, the Minister requested from the taxpayers information regarding the 1997 and 1998 tax deductions. Dunwoody responded on behalf of the taxpayers on September 20, 2000, but certain information requested by the Minister was not supplied.

[10]By letters dated May 11, 2001, the Minister set out his position as to why the taxpayers should not be allowed the deductions taken for the CIBC loans in the 1997 taxation year. Subsequently, the taxpayers were reassessed by the Minister and the interest deductions were disallowed for the 1997 and 1998 taxation years. On August 7, 2001, each of the taxpayers filed notices of objection to challenge the correctness of the reassessments. Those objections are now outstanding. Meanwhile, on July 11 and July 18, 2001, the requirements were served on Dunwoody.

[11]The requirements required production of numerous documents, including all tax files, planning documents, working paper files, permanent files, records, minutes or notes of all conversations or meetings, detailed billings, detailed telephone records, promotional material, and correspondence relating to the taxpayers. In addition, they required answers to a number of questions to be answered by Mr. Hughes, the taxpayers' accountant at the Kelowna office of Dunwoody, and Mr. Butalia. The questions would appear to be designed to elicit facts that were likely to be within the knowledge of Mr. Hughes and Mr. Butalia. There has been no suggestion that Mr. Hughes and Mr. Butalia did not possess the knowledge required to answer the questions. However, the Minister conceded that if they did not possess the information, an answer to that effect would have complied with the requirements.

[12]The taxpayers and Dunwoody commenced an application for judicial review challenging the validity of the requirements, and also making a claim of privilege with respect to the required documents and information. The Applications Judge allowed the application in part. He found that the general tax liability of the taxpayers was the subject of a genuine and serious inquiry by the Minister, and that the requirements met the tests of relevance and reasonableness established by this Court in *AGT Ltd. v. Canada (Attorney General)*, [1997] 2 F.C. 878 (C.A.). However, he interpreted subsection 231.2(1) as giving the Minister the right to require the production of documents, but not the right to require the answers to questions, and on that basis he held that the requirements were invalid with respect to the questions asked of Mr. Hughes and Mr. Butalia.

[13]The Applications Judge also indicated that if any of the documents or information to be produced under the requirements referred to a client of Dunwoody unrelated to the respondents, Dunwoody had the right to redact the documents to expunge that person's name before the document or information was submitted to the Minister. Dunwoody did not redact any information from the requested material which it prepared but did not deliver to the Minister, pending the ultimate outcome of these proceedings.

Analysis

Issue (a): Does subsection 231.2(1) allow Dunwoody to refuse to answer the Minister's written questions or to create new documents?

[14]The Applications Judge held that the powers of subsection 231.2(1) require the production of documents and information in existence, but that it is not framed so broadly that accountants can be required to respond to written interrogatories. He reasoned that if subsection 231.2(1) of the Act were intended to be so broad as to provide the Minister with the option to conduct a written examination for discovery, Parliament would have so provided. It is my respectful opinion that the learned Applications Judge erred in his interpretation of subsection 231.2(1). His error, in my view, lies in his failure to give a meaning to paragraph 231.2(1)(*a*).

[15]In statutory interpretation there is a presumption against redundancy. The governing principle has been described in Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at page 158:

It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.

[16]The same principle is expressed as follows by Iacobucci J. in *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, at page 408:

It is a principle of statutory interpretation that every word of a statute must be given meaning: "A construction which would leave without effect any part of the language of a statute will normally be rejected" (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 36).

[17]Applied in this case, that principle dictates that meaning must be given to both paragraphs (*a*) and (*b*) of subsection 231.2(1), and unless there is good reason to the contrary, a different interpretation must be given to both paragraphs, and different meanings to the words "information" and "document".

[18]The word "information", used in paragraph 231.2(1)(*a*), is not defined in the Act. Referring to the *The Concise Oxford English Dictionary*, 10th ed., "information" is defined as "facts or knowledge provided or learned as a result of research or study" or "what is conveyed or represented by a particular sequence of symbols, impulses, etc." The French version of paragraph 231.2(1)(*a*) uses the word "*renseignement*". In *Collins Robert Unabridged French-English, English-French Dictionary* (5th ed.), "*renseignement*" is defined as "information, piece of information".

[19]Turning to paragraph 231.2(1)(*b*), it provides the Minister with the power to compel production of "any document". Again, referring to *The Concise Oxford English Dictionary*, 10th ed., "document" is defined as "a piece of written, printed, or electronic matter that provides information or evidence or that serves as an official record." However, the word "document", as used in the Act, is not restricted to writings. It is defined in section 231 [as am. by S.C. 1998, c. 19, s. 228] to include "money, a security and a record". "Record" in turn is defined in subsection 248(1) [as enacted *idem*, s. 239] as including "an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form".

[20]Paragraph 231.2(1)(*a*), when properly interpreted, empowers the Minister to compel a taxpayer to provide "information", meaning knowledge or facts. In order to exercise this power, the Minister must be able to ask questions to elicit the knowledge, facts or figures. The words "return of income or supplementary return" in paragraph (*a*) does not detract from this interpretation as the preceding word "including" means that the phrase is not exhaustive of the meaning of "information." These words enable the Minister not only to get the information regarding a taxpayer's income, but also to specify the form in which this information must be provided, i.e. a tax return containing

prescribed information rather than in a letter. In my view, the Minister is therefore able to compel production of documents and records under paragraph 231.2(1)(*b*) and ask questions to elicit knowledge or facts under paragraph 231.2(1)(*a*).

Issue (b): Does subsection 231.2(1) of the Act permit Dunwoody to redact, that is, remove, confidential references and information in respect of persons other than the taxpayers from the documents to be delivered in response to the Minister's requirements?

[21]In preparing to disclose the requested material to the Minister, Dunwoody was concerned that some material might contain the names of or information concerning other clients not legally associated with or related to the taxpayers. Accordingly, during the course of argument, Dunwoody asked the Applications Judge for permission to redact such names or information from the material if it became necessary to protect confidential third party information. The Applications Judge agreed with this proposal.

[22]Once Dunwoody assembled the required documents, it was discovered that there was nothing to be redacted. It is argued for the taxpayers that this issue should not be dealt with at all because it is moot, in the sense that there is no live controversy between the parties on the question of redaction of the documents. The Crown argues that this is an appropriate case in which to deal with the issue despite its mootness (see *Borowski v. Canada (Attorney General*), [1989] 1 S.C.R. 342, at page 353). In my view, it is appropriate to deal with the Applications Judge's conclusion on the redaction issue, despite its mootness, because of the likelihood of uncertainty and confusion that could result from the Applications Judge's comments, and also because the issue is amenable to a simple resolution.

[23]The record before the Applications Judge contains no evidence that there was any third party information in any of the documents that were the subject of the requirements. Dunwoody's proposal to redact third party information was based solely on speculation as to a potential future problem. Therefore, the Applications Judge erred in stating that Dunwoody has a right of redaction with respect to the documents that are the subject of the requirements. Rather, what he should have concluded is that Dunwoody had failed to establish any factual basis for asserting a right of redaction (assuming, without deciding, that such a right may exist).

[24]That is sufficient to dispose of the redaction issue in this case. I recognize that this resolution of the matter leaves unanswered theoretical questions. For example, it is debatable whether there is a right of redaction at all with respect to documents that fall within the scope of a valid requirement under subsection 231.2(1). In this regard, there is jurisprudence from the Supreme Court of Canada that supports the proposition that a requirement is not invalid merely because it results in the disclosure of private transactions involving persons who are not under investigation and may not be liable to tax (see *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729, at page 735; *James Richardson & Sons, Ltd. v. Minister of National Revenue et al.*, [1984] 1 S.C.R. 614, at page 623; and *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at page 639).

[25]If a right of redaction exists in theory, there is an issue as to who ought to determine whether the right should be exercised in a particular case, the person to whom the requirement is directed, or the Minister, or the court. If a dispute should arise in future about the right to redact a document that is within the scope of a valid requirement but contains third party information that for some reason the Minister ought not to have, I have no doubt that the parties will find a way to have the issues debated in an appropriate forum. Meanwhile, I prefer to express no opinion on issues that do not arise in this case.

[26]For these reasons, the Minister's appeal is well founded and should be allowed, subject only to the resolution of the issues raised in the cross-appeal.

Issue (c): Were the requirements issued for the purpose of the administration and enforcement of the Act within the meaning of

section 231.2?

[27]The evidence establishes that the requirements are intended to test the taxpayers' entitlement to the interest deduction. Broadly speaking, entitlement to the interest deduction depends upon whether the statutory conditions in paragraph 20(1)(*c*) [as am. by S.C. 1994, c. 7, Sch. II, s. 15] of the *Income Tax Act* are met, and if not, whether the general anti-avoidance rule in subsection 245(2) applies.

[28]The position of the taxpayers is that the requirements would result in the disclosure of tax planning documents and information about their subjective intention in entering into the transactions that gave rise to the claim for the interest deduction. They argue that the Minister cannot possibly require tax planning documents and evidence of subjective intention for the purpose of the administration and enforcement of the *Income Tax Act*, because those matters are not relevant to the applicability of paragraph 20(1)(*c*) or subsection 245(2). I am unable to accept this argument. The scope of subsection 231.2(1) is not as limited as the taxpayers suggest.

[29]A number of cases have dealt with the scope of subsection 231.2(1) (see *R. v. McKinlay Transport Ltd.*, *supra*; *James Richardson & Sons, Ltd. v. Minister of National Revenue et al.*, *supra*; *AGT Ltd. v. Canada (Attorney General)*, *supra*; and *R. v. Jarvis*; [2002] 3 S.C.R. 757, at paragraph 51). The relevant principles from these authorities establish that the determination of a taxpayer's tax liability is a purpose related to the administration and enforcement of the Act. A requirement is valid if the requested information may be relevant in the determination of the tax liability of the named taxpayer. This is a low threshold. Subsection 231.2(1) gives the Minister a broader authority to obtain information than would be the case if, for example, the Minister were conducting pre-trial examinations for discovery in the context of an income tax appeal.

[30]In my view, the information which the taxpayers object to producing may be relevant to determining their tax liability under the Act. As Desjardins J.A. stated at paragraph 23 for an unanimous panel of this Court in *AGT Ltd. v. Canada (Attorney General)*, *supra*:

Because of the nature of the conduct regulated by the *Income Tax Act*, there are, in many cases, no ways of determining whether proscribed conduct has been engaged in, short of studying the process by which a suspected corporation or business has made and implemented its decision.

[31]First of all, tax planning information can shed light on intention and therefore may be important in interpreting contracts or determining whether persons are acting at arms' length. Further, it may be relevant in determining the residency of the taxpayers, which is an issue in the present case, since a relevant factor is whether they intended to sever their ties to Canada permanently or only temporarily. Finally, the subjective intention of the taxpayers may be relevant in determining interest deductibility or the applicability of the general anti-avoidance provision. The purpose test may be an objective one, but a taxpayer's intention is certainly a relevant consideration (see *Ludco Enterprises Ltd. v. Canada*, [2001] 2 S.C.R. 1082, at paragraphs 54-55; and *Fraser Milner Casgrain v. M.N.R.*, [2002] 4 C.T.C. 210 (F.C.T.D.)).

[32]The taxpayers also assert that the requirements, which are intended to elicit information about the 1997 and 1998 taxation years, were issued more than three years after the initial assessment of those years, and thus after the expiry of the normal limitation period for those years. They argue that because the Minister cannot reassess those years, they need not produce any documents covered by the requirements. I cannot agree. First, there is no statutory time limit for requirements. Second, the record does not establish that the Minister cannot reassess the taxpayers for 1997 and 1998. Assuming, without deciding, that the requirements relate only to those years, there are numerous statutory provisions that permit the Minister to reassess within three years after the expiry of the normal limitation period. There are also statutory exceptions that remove all time limitations.

[33]Finally, the taxpayers argue that the requirements improperly

subvert the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688, relating to pre-trial discovery. The simple answer to this argument is no income tax appeal has been commenced in this case. In any event, the Minister's right to investigate the affairs of a taxpayer is not necessarily limited by the commencement of an appeal (see *Imperial Oil Ltd. v. Canada*, 2003 DTC 5485 (F.C.A.)). There may be situations where the exercise of a statutory power of investigation is abusive, but this is not such a case.

[34]For the foregoing reasons, in my analysis, the Applications Judge correctly determined that the requirements were issued for the purpose of the administration and enforcement of the Act.

Issue (d): Was certain of the requested material that was prepared by Dunwoody for the purpose of providing tax advice to the taxpayers privileged?

[35]This issue raised the question as to whether tax memoranda, notes of tax advice, or other documents which set out or show the tax advice given by a tax accountant to a client and the reasoning or analysis behind the tax advice are privileged communications. If so, such communications would not be subject to disclosure under Canadian law even though the subject matter may be relevant to an income tax audit or Tax Court proceeding.

[36]The Supreme Court of Canada has recognized that there are two types of legal privilege--"class" privilege and "case-by-case" privilege (see *R. v. Gruenke*, [1991] 3 S.C.R. 263, at page 286). The taxpayers urge that their confidential communications with Mr. Butalia, when properly understood, can fit within either category of privilege. They assert that the evidence establishes that they dealt with Dunwoody, and Mr. Butalia in particular, on the understanding that the tax advice they received was confidential. They argue that had they known that tax advice could only be shielded by solicitor-client privilege they would not have discussed the matters with Dunwoody.

[37]In 1990, this Court confirmed that an accountant-client privilege does not exist in relation to advice given by an accountant in connection with the search and seizure provisions of the Act [*Income Tax Act*, S.C. 1970-71-72, c. 63, s. 231.3 (as am. by S.C. 1986, c. 6, s. 121)] (see *Baron v. Canada*, [1991] 1 F.C. 688 (C.A.)). The taxpayers say it is now time to recognize a class privilege for communications between tax accountants who provide professional tax advice to their clients in the course of a professional relationship and such privilege should extend to all types of tax advice; income tax, excise tax, goods and services tax, sales tax and real property tax. It is urged that the categories of privilege are not static and can evolve over time, with the identification of a new class on a principled basis (see Lamer C.J. in *R. v. Gruenke*, *supra*, at pages 289-290).

[38]I see nothing in the submissions of the taxpayers that militates against the earlier ruling rendered by this Court in *Baron v. Canada*, *supra*. Solicitor-client privilege is rooted in the proper administration of justice, made necessary by the need for confidential advice in prosecuting one's rights and preparing defences against improper claims (see *R. v. McClure*, [2001] 1 S.C.R. 445, at paragraphs 31-35). Lawyers are legally and ethically required to uphold and protect the public interest in the administration of justice (see *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, at paragraph 49). In contrast, accountants are not so bound. Nor do they provide legal advice, as to do so would constitute a breach of provincial and territorial laws governing the legal professions. In my analysis, no overriding policy consideration exists so as to elevate the advice given by tax accountants to the level of solicitor-client privilege.

[39]As for case-by-case privilege, the Supreme Court of Canada has directed that the principles set out by Professor Wigmore in his American treatise on evidence provide a general framework to determine whether or not a communications is privileged. Within this framework, policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in each case. Consequently, a principled approach to the question of

case-by-case privilege should always be employed, taking into account each of the four factors, and the particular circumstances of each case (see *R. v. Gruenke*, *supra*, at pages 289-290).

[40]The four Wigmore principles are these:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. [Emphasis added.]

(See John Henry Wigmore, *Evidence in Trials at Common Law*, Vol. 8, McNaughton Revision (Boston: Little, Brown, 1961), at page 527.)

[41]In discussing the first Wigmore principle, the Supreme Court of Canada has stated that "it is absolutely crucial that the communications originate with an expectation of confidentiality . . . . Without this expect-ation of confidentiality, the *raison d'être* of the privilege is missing" (see *R. v. Gruenke*, *supra*, at page 292). While a chartered accountant, as a matter of professional ethics, is required to keep his communications with clients confidential, the accountant knows, or should know, that this confidentiality is restricted by the power of the Minister to require disclosure. Therefore, Dunwoody and the taxpayers have not discharged their onus of showing that the relationship in issue carried with it an expectation of confidentiality sufficient to meet this first Wigmore principle.

[42]The taxpayers have also not shown that confidentiality was essential to the full and satisfactory maintenance of their relationship with Mr. Butalia so as to satisfy Wigmore's second principle. Confidentiality may be desired, as with all personal and professional relationships, but the relationships here did not depend on confidentiality for their existence. Indeed, according to his evidence, had Mr. Kitsch believed that there was no confidentiality involved, he would have still used the same firm of accountants for business and financial advice.

[43]Further, the taxpayers have not shown that the tax accountant-client relationship is one that in the opinion of the community ought to be sedulously fostered to the degree that would attract privilege. While confidentiality may be preferred, the tax accountant-client relationship is in no way as fundamental to society and the administration of justice as the solicitor-client relationship.

[44]The rare situations where case-by-case privilege has been extended to certain specifically identified communications have included clients and their doctors, sexual assault therapists and clergy. These relationships are sedulously fostered to the extent that privilege may apply to them in certain limited circumstances. The reason is obvious. Canadian society puts a much higher value on the physical, mental and spiritual integrity of a person than on personal wealth. It is recognized that unnecessary harm and suffering could result from deterring an individual from consulting a doctor, a sexual assault therapist, or a member of the clergy. The worst that could happen if a person is discouraged from seeking income tax advice is that the person might fail to take advantage of a tax saving opportunity, unfortunate perhaps, but not a threat to one's physical, mental or spiritual well being.

[45]In considering the fourth Wigmore principle, it must be determined whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and correctly disposing of the matter (see *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at paragraphs 16 and 31). The balancing of the injury to the relationship against the benefit of the correct disposal of the matter involves purely public policy considerations. As Chief Justice McLachlin held, at this

stage of analysis, an occasional injustice should not be accepted as the price of extending privilege from disclosure. While it is true that the traditional categories of privilege necessarily run the risk of occasional injustice, "that does not mean that courts, in invoking new privileges, should lightly condone its extension." (*M. (A.) v. Ryan*, *supra*, at paragraph 32). In that case, the potential injury to be suffered due to the disclosure of the disputed information was described, at paragraph 30, as one that:

. . . perpetuates the disadvantage felt by victims of sexual assault, often women. The intimate nature of sexual assault heightens the privacy concerns of the victim and may increase . . . the difficulty of obtaining redress for the wrong. The victim of a sexual assault is placed in a disadvantaged position as compared with the victim of a different wrong. . . . She is doubly victimized, initially by the sexual assault and later by the price she must pay to claim redress--redress which in some cases may be part of her program of therapy.

Nonetheless, the Court affirmed the disclosure of all documents except the personal notes of a person who would not be called as a witness at trial and whose opinion was of no consequence. The unsuccessful claim of privilege in that case illustrates the high threshold of injury necessary to overcome the benefit of correctly disposing of the matter.

[46]The taxpayers have not shown that any public injury would occur should these tax accountant-client communications continue to be subject to review by the Minister. Innumerable tax accountant-client relationships have functioned fully in the past notwithstanding the Minister's opportunity to review their communications. Whatever the public injury feared by the taxpayers may be, it has not precluded the full and satisfactory maintenance of those past relationships despite the Minister's powers of review. If tax accountant-client communications are subject to the spectre of case-by-case privilege, the harm done to the verification and enforcement of the Act would be considerable, and would outweigh whatever injury, if any, that would inure to such relationships. Overall, in my analysis, the balancing of public interests favours disclosure.

[47]The disputed communications in this appeal and cross-appeal do not meet any of Wigmore's four principles and are therefore not covered by case-by-case privilege. The Applications Judge correctly held that the documents requested in the requirements are not subject to either class or case-by-case privilege.

[48]It was drawn to the Court's attention that since July 22, 1998, the United States, pursuant to [*Internal Revenue Code*] 26 USC § 7525 (1986), has afforded a class privilege to federally authorized tax practitioners with respect to tax advice given to their clients. Except for criminal matters, the scope of that privilege, where the tax advice given involves either the Internal Revenue Service or United States Federal Court proceedings, is the same as for attorney-client privilege. While a matter of policy interest, it is of no consequence to the task at hand. In addition, a review of the content of that legislation undoubtedly reveals that enactment of the class privilege for accountants is better left with Parliament.

[49]The cross-appeal should be dismissed with costs. The appeal should be allowed with costs, the order of the Applications Judge, dated September 3, 2002, should be set aside, and the application for judicial review should be dismissed with costs.

Létourneau J.A.: I agree.

Sharlow J.A.: I agree.