CLIENT-PRIVILEGE IN THE CONTEXT OF TAX ADVICE

Jason T. Kujath

Law 6738: *Tax Administration and Litigation*

Ed Kroft, QC.

Osgoode Hall Law School, York University

Thank you for reading this paper and providing your critical analysis.

"We seem to feel the need to deal with every aspect of every point that is argued, and that makes the judgment often difficult and unrewarding to follow. Reading some judgments one rather loses the will to live - and that is particularly disconcerting when it's your own judgment that you are reading."[1]

- The 2013 Address by Lord Neuberger of Abbotsbury, President of the UK Supreme Court

[1] Quoted by Justice Boyle in *McKesson, infra,* note 143.

CLIENT-PRIVILEGE IN THE CONTEXT OF TAX ADVICE

I. INTRODUCTION

Privilege is fundamental to the rule of law.[1] However, whether privilege applies to communications between a client and a tax-accountant is another issue. In 2013, the UK Supreme Court made a pronouncement in regard to whether accountant client privilege could be granted under the common law; in doing so, although already settled in Canada, the Court brought the issue back into relevance.

If afforded privilege, tax memoranda, notes of tax advice, or other documents that set out or show the advice and reasoning/analysis provided by an accountant to a client would be protected from disclosure. Such communications would not be subject to the scrutiny of the CRA even though the subject matter may be relevant to an income tax audit or Tax Court proceeding. In *Prudential,*[2] the issue was framed by the United Kingdom Supreme Court as the following:

> Suppose that two individuals, A and B, have the same problem, the solution to which depends upon an application of the legal principles of taxation law to the same, or substantially the same, facts. Suppose that A seeks advice from, say, Freshfields, and that B seeks advice from, say, PricewaterhouseCoopers. Each asks the same question and gives an account of what are substantially the same facts to the person from whom the advice is sought. Each is receiving legal advice. The question for decision in this appeal is whether the information given and the advice received are privileged as legal advice. Are both A and B entitled to claim the privilege and refuse to disclose to HMRC the information and the advice?[3]

Simply put, lawyers are of the opinion that the broad application of privilege to advice from other professionals would be extend the principle of privilege to a class not recognized under the common law. And to the contrary, accountants assert that lawyers are afraid it would devalue their advice. One could wax poetic to the reasoning behind each profession; however, for the purpose of this paper, I will keep such ambitions to myself and instead substantiate the paper with the principles of privilege and, subsequently, these principles application to advice provided by accountants.

---

1 See *Solosky v The Queen*, [1980] 1 SCR 821 at p 839 [*Solosky*]. The Supreme Court of Canada ("**SCC**") has described solicitor-client privilege as a "fundamental civil and legal right". See also Canadian Bar Association, "*Accountants' Privilege*" CBA Newsletter: Legal and Governmental Affairs, November 2013 [*CBA Newsletter*]. The Canadian Bar Association has opined that solicitor-client privilege is a "fundamental, foundational element of our justice system and strives to ensure its rigorous protection against any potential infringement".

2 As defined and discussed below.

3 See *Prudential plc & Anor, R (on the Application of) v. Special Commissioner of Income Tax & Anor* [2013] UKSC 1 at para 140 [*Prudential*]. Note that this decision is further discussed below under the heading "*Accountant-Client Privilege*".

Privilege is a legal concept. Confidential communication between a client and lawyer is pivotal for the proper administration of justice.[4] This is as true for a tax lawyer as it is for a corporate, criminal, or civil attorney; courts have consistently held that the ability of a client to freely speak to their lawyer is paramount to other societal considerations.[5]

The purpose of this paper is to set out the essential principles of privilege and to highlight why privilege, as a fundamental concept to the proper administration of justice, does not apply to communications other than those made with a lawyer for a legal purpose. The general discussion of privilege that immediately follows is to provide a basic understanding of privilege to facilitate the discussion for its extension to accountants. Subsequently, I have outlined general recommendations for tax advisors regarding the protection of documents from disclosure.

II. THE CONCEPT OF PRIVILEGE

The doctrine of privilege protects information from disclosure in court:

> The law recognizes a number of communications as worthy of confidentiality. The protection of these communications serves a public interest and they are generally referred to as privileged.[6]

Solicitor-client privilege is an exclusionary rule of evidence as well as a substantive rule;[7] that is, it can be asserted outside of a litigation context.[8] It applies to communications: (1) between a lawyer and a client, including an agent of the client; (2) when seeking or giving legal advice; that (3) are intended to be confidential.[9]

If privilege is raised, the burden rests on the person claiming privilege to show that, on a balance of probabilities, the communication is privileged.[10] However, there is an inherent conflict within our justice system when a party asserts privilege: on one hand, policy promotes the administration of

---

4 Solicitor-client privilege has been elevated to be of quasi-constitutional status. See *Lavallee*, *infra*, note 22.

5 See, for example, *M(A) v Ryan*, [1997] 1 SCR 157 (SCC), where the Court held that the emotional harm caused by the redress of the claim by a victim of sexual assault did not outweigh the need for its factual disclosure.

6 See *R. v. McClure*, 2001 SCC 14 at para 26.

7 See *Imperial Tobacco Canada Ltd v R,* 2013 TCC 144; *Descôteaux c Mierzwinski*, [1982] 1 SCR 860 (SCC); See also *Blank v Canada*, 2006 SCC 39, [2006] 2 SCR 319. See also Sopinka, Lederman & Bryant "*The Law of Evidence in Canada"*, 3rd Ed (LexisNexis Canada:2009) [*Sopinka et al*.].

8 Dan Misutka, "*Select Issues Related to Solicitor-Client privilege*", in Tax Dispute resolution, Compliance, and Administration in Canada, Proceedings of the June 2012 Conference (2013) (Toronto, Ont: CTF, 2012) at 7:4 [*Misutka*].

9 *Solosky*, *supra*, note 1 at 837.

10 See *Imperial, infra,* note *1*17 at para 52. See also citing Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada*, 3rd ed (Markham, Ont: LexisNexis, 2009) at para 14.43.

justice and requires probative evidence to be put before the court; on the other, there is a social interest in preserving and encouraging particular relationships (*e.g.* solicitor-client).[11] In general, courts recognize that to "promote broader public interests in the observance and administration of justice,"[12] "full and frank communication between attorneys and their clients" is required.[13]

For accountants, however, the protection accorded to legal advice in relation to tax matters is contentious.[14] Accountants have a duty to keep information concerning the business and affairs of clients confidential.[15] However, the concept of confidentiality is generally broader than that of privilege (*i.e.* information may be confidential without being privileged). For example, an accountant may not disclose the business affairs of his client to others as the information is confidential. However, if deemed relevant by a court, this same information must be disclosed if it is not privileged. Confidentiality does not provide the same protection as privilege. Unlike privilege, confidentiality is not a rule of evidence.[16] Thus, although accountants are obligated under the duty of confidentiality by their professional code, the duty does not afford accountants privilege. It is this that creates tension between professions.

A. General Principles

The decision of *Imperial Tobacco Canada Ltd. v R*[17] provides a useful summary of the general principles regarding solicitor-client privilege. Of significance is that the Court recognized the import of the protection of privilege in the context of taxation. In *Imperial Tobacco*, Justice D'Arcy cited the following paragraph of the SCC's decision in *Blank v Canada*:

> [solicitor-client privilege] recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties

---

11 See *Sopinka et al*, *supra,* note 7 at 909.

12 *Upjohn Co v United States* (1981) 449 US 383, 389, quoted in *Three Rivers District Council v Governor and Company of the Bank of England* (No 6) [2005] 1 AC 610 at para 31; *Prudential*, *supra*, note 3 at para 18.

13 See *Prudential*, *supra*, note 3 at para 2.

14 See Gabe Hayos, CPA President's Note: *Freedom of choice: Taxpayers' right to confidential tax advice* (CPA Canada:2013)<http://www.cica.ca/focus-on-practice-areas/taxation/conversations-about-tax/entries/item78201.aspx>.

15 See *R v Cunningham*, 2010 SCC 10 at para 31.

16 See *Solicitor General of Canada, et al v Royal Commission (Health Records)*, [1981] 2 SCR 494 at 512 per Laskin CJ dissenting.

17 *Imperial Tobacco Canada Ltd v R*, 2013 TCC 144 [*Imperial*].

> effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship [..] is a necessary and essential condition of the effective administration of justice.[18]

With that said, privilege is not of blanket application; not every communication between a client and lawyer is accorded protection. For example, communications between employees of a company that discuss confidential legal advice provided by a lawyer are privileged.[19] Similarly, legal advice provided by the Department of Justice to the CRA is also privileged.[20] However, internal communications that do not constitute the passing of confidential legal advice or that do not directly involve the seeking of legal advice are not privileged. Neither are communications with a lawyer in regard to business advice.

A document does not become privileged merely because a copy is sent to a lawyer. Although, if the lawyer marks the document or makes a note on it, then it may become a working paper of the lawyer and the marked copy may be privileged.[21] Furthermore, privilege belongs to the client; it is not for the lawyer to waive. Only the client may do so. [22] The client may either expressly waive the protection of privilege or waiver may be found by implication.[23]

Solicitor-client privilege is maintained, however, in a commercial transaction when one party (*e.g.* a vendor) provides privileged documents to the other (*e.g.* purchaser). This allows those engaged in commercial transactions to "exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice,"[24] and is known as *common interest privilege*.[25] In *Fraser Milner Casgrain LLP v. Minister of National Revenue,*[26] the BCSC described *common interest*

---

18 See *Blank v Canada*, 2006 SCC 39 at para 26, [2006] 2 SCR 319 [*Blank*].

19 *Imperial, supra,* note *1*7 at para 56.

20 *Global Cash Access (Canada) Inc. v R,* 2010 TCC 493 at para 5, [2010] GSTC 145 (TCC [General Procedure]).

21 *Imperial, supra,* note 17 at para 57. See also *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* (1988), 88 DTC 6511 (Ont HC) at 6513 [*Mutual*].

22 See *Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General) & R v Fink*, 2002 SCC 61 at para 24 [*Lavallee*].

23 *Imperial*, *supra*, note 17 at para 63. Please note that the law surrounding the issue of waiver of privilege is vast. Courts have considered the many distinct factual circumstances where privilege may or may not be waived. For the purpose of this paper, I will highlight only common interest privilege. For a discussion of waiver of privilege, see the *Misutka* paper cited throughout this document. See *Misutka*, *supra*, note 8 at 7:10.

24 *Ibid* at para 63; See also *Archean Energy Ltd. v Minister of National Revenue* (1997), 98 DTC 6456 (Alta QB).

25 See *Fraser Milner Casgrain LLP v MNR*, 2002 BCSC 1344, 2003 DTC 5048 (BCSC).

26 *Ibid*.

privilege as a form of privilege that is "not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations."[27]

B. The Common Law Framework of Privilege

Under the common law, there are two recognized categories of privilege: (1) class privilege; and (2) case-by-case privilege. Solicitor-client privilege is a "class privilege" whereas "case-by-case" privilege is used to extend the protection of privilege to novel scenarios. If a communication is not privileged as a class, to be protected from disclosure, it must meet the criteria set out for the case-by-case determination. This is relevant to the discussion below regarding accountant-client privilege. The following will outline: (a) the two types of privilege; and (b) their principled application.

(1) Class Privilege

In *R v Gruenke*, Justice Lamer discussed class privilege as:

> […] a form of privilege recognized at common law and one for which there is a *prima facie* presumption of inadmissibility [...] unless the party urging admission can show why the communications should not be privileged [...]. Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category [...].[28]

Solicitor Client Privilege

Solicitor-client privilege is one of a limited number of recognized classes. It occupies a "unique position in our legal fabric"[29] and facilitates the proper administration of justice. It is all but absolute in its "recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship."[30] It transcends the other forms of privilege, which are, generally, evidentiary rules.[31] In *R v McClure*, the SCC stated:

> For a relationship to be protected by a class privilege [...] the relationship must fall within a traditionally protected class. Solicitor-client privilege, because of its unique position in our legal fabric, is the most notable example of a class privilege.[32]

In *Smith v. Jones,* the SCC discussed the importance of protecting solicitor-client privilege:

---

27 *Ibid* at para. 14.

28 See *R v Gruenke*, [1991] 3 SCR 263 per L'Heureux-Dubé J, 8 CR (4th) 368 [*Gruenke*].

29 See *R v McClure*, 2001 SCC 14 at para 14, 40 CR (5th) 1 [*McClure*].

30 See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at para 53.

31 See *Blank, supra,* note 18 at paragraph 24.

32 See *McClure*, *supra*, note 29 at para 28.

> As the BCCA observed [in the case at bar], solicitor-client privilege is the privilege "which the law has been most zealous to protect and most reluctant to water down by exceptions." Quite simply it is a principle of fundamental importance to the administration of justice.[33]

With that said, before consideration is given to broadening the classes of privilege it must be demonstrated that the external social policy in question is of such unequivocal importance that it cannot be sacrificed.[34] This point is important to keep in mind when considering the extension of privilege to accountants.

The term, solicitor-client privilege is often used to refer to the protection of all discussions between a lawyer and a client. This is simply not the case. Only when the purpose of the communication is to give or receive legal advice does privilege protect the contents of communications passing between a lawyer and client. The privilege afforded under the recognized class is narrow in its application. In *Descôteaux v Mierzwinski*,[35] the SCC explained the limited context where solicitor-client privilege applies as only when the following is satisfied:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.[36]

From the above, we can discern three conditions required for legal advice privilege to apply:

(1) **Legal Advice Must Be Provided to the Client:** privilege applies to communications between a lawyer and client whenever a client seeks legal advice.[37] It is not a requirement that litigation is anticipated, expected or even planned;

(2) **From a Legal Adviser, as a Legal Adviser:** A lawyer must be acting as a legal advisor: privilege does not extend to business advice given by a lawyer as a business advisor. It extends only slightly beyond the legal context. It includes advice provided to a client by a lawyer and the information collected by the lawyer in order to ascertain the context of which the advice is to be given.[38]

(3) **Made in Confidence:** There must be an expectation by the client that the communication will be confidential. This is a key requirement thatmust be satisfied before a communication will be found to enjoy solicitor-client privilege.[39]

To further complicate solicitor-client privilege, it is important to discuss the distinction between: (a) "legal advice privilege"; and (b) "litigation privilege".

---

33 See *Smith v. Jones*, [1999] 1 SCR 455 at para 50.

34 See, generally, *Gruenke*, *supra*, note 28.

35 See *Descôteaux v. Mierzwinski*, [1982] 1 SCR 860 at 873 [*Descôteaux*].

36 *Ibid* at 873.

37 See *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para 29.

38 *Descôteaux*, *supra*, note 35 at 876.

39 See *R. v Dunbar*, [1982] OJ No 581, 68 CCC (2d) 13 (Ont CA) at para 53.

Legal Advice Privilege v Litigation Privilege[40]

Legal advice privilege ("**LAP**") differs from litigation privilege ("**LP**") as the former does not require litigation to be contemplated. LAP attaches to communications between a lawyer and client made for the purpose of giving or receiving legal advice whereas LP attaches to communications made for the dominant purpose of litigation.[41] On the surface, the distinction is narrow; however, in *College of Physicians of BC v British Columbia* the BC Court of Appeal provided some clarification:

> For the purposes of these reasons, I will use the phrase "legal advice privilege" [...] to refer to the privilege that attaches to communications between solicitor and client for the purposes of obtaining legal advice, and "litigation privilege"[...] to refer to the privilege that attaches to communications and material produced or brought into existence for the dominant purpose of being used in the conduct of litigation.[42]

LP is a rule of evidence[43] and attaches to advice provided for the dominant purpose of litigation.[44] LP is not a true solicitor-client privilege; unlike LAP, it does not require a lawyer-client relationship.[45] In *Blank,* the SCC stated:

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.[46]

When considered as a rule of evidence, privilege runs contrary to the proper administration of justice by hindering the determination of the truth of matter that underlies the dispute. Therefore, the SCC has opined that there should be discretion applied to further assigning classes of privilege to not entirely obstruct justice.[47] This restricted application should not, however, apply to solicitor-client privilege in relation to legal advice.[48]

---

40 *Ibid.* Note that these two forms of "solicitor-client privilege" each have a broad set of common law principles associated with their application. For the purpose of this paper, the two forms are mentioned to provide a base understanding of privilege.

41 See *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 28.

42 *Ibid*.

43 See, generally, *R v O'Connor*, [1995] 4 SCR 411.

44 See *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para 43.

45 Litigation privilege is based upon the adversarial nature of the trial process: See *Sopinka et al, supra,* note 7 at pg. 909.

46 *Ibid* at para 27.

47 *Gruenke*, *supra*, note 28 per L'Heureux-Dubé J.

48 *A (LL) v B (A)*, [1995] 4 SCR 536 at para 33 per L'Heureux-Dubé J.

(2) Case-by-Case Privilege

With regard to case-by-case privilege, in *Gruenke*, Lamer J stated:

> The term "case-by-case" privilege is used to refer to communications for which there is a *prima facie* assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (see above), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.[49]

The common law framework for the application of privilege on a case-by-case basis is known as the *Wigmore criteria*. This framework is used for forms of communication that fall outside of the dedicated classes. However, as solicitor-client privilege is a "class privilege", it falls outside of this test. For privilege to apply, on a balance of probabilities, the following criteria must be met:

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

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

(c) The relation must be one which in the operation of the community ought to be sedulously foster; and

(d) The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. [50]

Canadian courts have taken a rigid approach to the designation of new relationships as a class privilege. The resistance is generally on the basis that the expansion of classes results in the loss of valuable evidence for the truth-seeking process.[51] For this reason, if privilege is claimed by a party not designated privilege as a class, courts will generally apply the *Wigmore* principles listed above. A discussion of these principles in the context of accountant-client privilege is set out below.

---

[49] *Gruenke*, *supra*, note 28 per L'Heureux-Dubé J.

[50] Please note that the Court in *Gruenke* summarized and brought into law the *Wigmore* test for *ad hoc* privilege. See Wigmore, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision at para 2285.

[51] David Paciocco and Lee Stuesser, *The Law of Evidence* (Ontario: Irwin Law, 1996) at 144.

III. ACCOUNTANT-CLIENT PRIVILEGE

In Canada, privilege is not afforded to tax-advice from accountants.[52] However, I believe it is fair to argue that clients of tax-accountants should be afforded privilege if the advice provided to them meets the same legal standard required for either of the two relevant forms of privilege.[53]

The attachment of privilege to advice from an accountant was first considered in *Baron v R*[54] and reconsidered in *Tower v Minister of National Revenue.*[55] As it stands, courts have confirmed the nonexistence of accountant privilege and highlighted that its creation should be left for Parliament.[56] With that said, the Act provides CRA officials with an array of compliance tools to request or require information for verification and administrative purposes. As discussed below, this information is privileged when provided to clients, or to accountants on behalf of clients, by a lawyer.

A. Legislative Privilege

"*Solicitor-client privilege*" is defined in subsection 232(1) of the Act to mean:

> […] the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.[57]

Subsection 232(3) outlines the procedure for a CRA officer when solicitor-client privilege is claimed. If claimed, a CRA officer is no longer entitled to seize and place the documents into custody. Under the procedure set out, a CRA officer is to package seal and identify the documents as being claimed as privileged then place the package in the custody of a sheriff.[58] The privilege can be asserted by either lawyer or client as a common-law quasi-constitutional right. [59]

---

52 See *Baron, infra,* note 84 at para 36*;* See *Tower, infra, note 75;* See also, generally, *re Missiaen et al*, [1967] CTC 579 (Alta SC). Please note that this point is further discussed below.

53 Please note that "criteria" refers to that of either class privilege or case-by-case privilege.

54 *Baron*, *infra*, note 84.

55 *Tower, infra*, note 75.

56 *Ibid* at para 37.

57 As defined by subsection 232(1) of the *Income Tax Act* (Canada) RSC, 1985, c 1 (5th Supp) (the "**Act**"). Please note that the definition of *Solicitor-client privilege* in the Act is only in consideration of litigation privilege: see Colin Campbell, *Administration of Income Tax 2013*, (Carswell: 2013) at 313 [*Colin Campbell*].

58 In such cases, subsection 232(3.1) of the Act requires that documents are retained by a lawyer after proper identification and until adjudication. The result is that documents may only be seized and placed into custody where a warrant authorizing seizure has been obtained by the CRA. In these cases, subsection 232(3) will continue to provide that the

It is interesting to note that the analysis in *Lavallee* outlined that privilege does not need to be asserted in order to come into existence; rather it exists independent from its assertion. Although competent tax counsel should attempt to assert blanket privilege at the outset, this should not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder. However, subsections 232(3) and (3.1) provide a procedure for privilege only when it is asserted under the procedure stated in subsection 232(4). If the procedural steps are not taken, the privilege is lost. This positive obligation on counsel shifts the burden of guaranteeing the respect for *Charter* rights from the state to the lawyer.[60]

For this reason, as many authors have pointed out, subsection 232(3) is probably unconstitutional.[61] That is, the provision provides more than the minimum interference that could have been legislated. Currently, the question of constitutionality is proceeding through the courts. In *Chambres des notaires du Quebec,*[62] the Court ruled that 231.2 and 231.7 as well as the exclusion of accounting records in 232(1) from the definition of "*accounting records*" are inoperative with respect to lawyers and notaries as they infringe on solicitor-client privilege under the *Charter of Rights.*[63]

Subsection 232(3.1) provides a requirement to set aside and conserve a document in respect of which a lawyer has claimed solicitor-client privilege. It clarifies that subsection 232(3) applies to a claim made in the course of an on-site inspection/audit under section 231.1 and to a claim made following a requirement in writing under section 231.2.[64] Subsections 232(6) and 232(7) provide that documents held by a custodian upon a claim of privilege are to be handed over to the minister for review once a judge has reviewed the records in dispute and determined that privilege does not apply.

Subsection 231.1(1) of the Act provides the Minister with the authority to audit/inspect on site the documents of a taxpayer. Pursuant subsection 231.2(1), the Act provides the Minister with the

---

documents are seized, identified and placed into the hands of the sheriff or a custodian until adjudication. See Technical Note 232(3.1), dated Dec. 1997 [*TN 232(3.1)*]. See also Technical Note, 232(3), dated Nov. 1985 [*TN 232(3)*].

59 See subsection 232(3) of the Act.

60 See, generally, *Lavallee*, *supra*, note 22 at paras 39 and 40. See also *Misutka*, *supra*, note 8 at 7:4.

61 *Misutka*, *supra*, note 8 at 7:4.

62 *Chambres des notaires du Quebec* , 2010 CarswellQue 9351 (On appeal to the Quebec Court of Appeal).

63 David Sherman's Notes — Income Tax Act, 232(3).

64 TN 232(3.1), *supra*, note 58.

ability to initiate expansive requests for information from accountants.[65] Notwithstanding this authority, CRA policy, generally, excludes working papers from routine requests.[66] However, the "official" policy has always been that they could request access to accountants' and auditors' working papers.[67] These working papers include:

> […] working papers include working papers created by or for an independent auditor or accountant in connection with an audit or review engagement, advice papers, and tax accrual working papers (including those that relate to reserves for current, future, potential or contingent tax liabilities).[68]

In other words, tax accountants, upon request, are to disclose relevant information to the Minister. The CRA has commented that "officials should not request information that they know is subject to solicitor-client privilege" and that the CRA is open to "alternative dispute resolution procedures to resolve the question of privilege".[69] Clearly the Minister has a wide array of legislative options to compel production of financial records from taxpayers, which courts have not generally restricted the breadth of beyond requiring that the Minister's demands must be relatable to the administration and enforcement of the Act.

In other jurisdictions, such as the United State,[70] the United Kingdom,[71] Australia[72] and New Zealand,[73] communications with accountants are given some degree of evidentiary privilege. This is not

---

65 See subsection 231.2(2) of the Act.

66 See CRA Conference 2009-0316711C6 - CLHIA 2009 - *Accountants' Working Papers*, dated May 1, 2009.

67 See CRA Investigations Manual 7 Policy - 2010-06 - Acquiring Information from Taxpayers, Registrants and Third Parties, dated June 2010. Please note that working paper requests are discussed below.

68 *Ibid*. Note that the application of privilege to working papers is discussed below.

69 See CRA Round Table, 2010 Cdn Tax Foundation conference report, q. 26. At p. 4:25-26.

70 See section 7525 of the *Internal Revenue Code*; See also *CBA Newsletter, supra*, note 1: "In the US, the IRS has traditionally exercised self-restraint. There is no common law privilege for accountants, but a limited statutory privilege was extended in 1998 to communications between taxpayers and authorized tax practitioners. It applies to communications that would have been privileged had they been between a taxpayer and an attorney. The privilege does not apply in cases of fraud or criminal activity": see *CBA Newsletter, supra*, note 1.

71 See *CBA Newsletter, supra*, note 1: "In the UK, there is statutory authority for broad requests for working paper but the Inland Revenue has rarely sought access to accountants' working papers. The British Parliament extended a limited form of statutory privilege to accountants in 1989". However, see *Prudential*, *infra* note 3, where the UK Supreme Court recently denied the application of accountant-client privilege.

72 See, for example, Australian Law Reform Commission, *A Review of Legal Professional Privilege and Federal Regulatory Bodies,* December, 2007; See *CBA Newsletter, supra*, note 1*:* "In Australia, a self-restraint policy is promoted. In 2005, the Australian Taxation Office (ATO) recognized an "accountant's concession": "[w]hile recognizing that the Commissioner has the legislative power to request access to most documents, it is accepted that there is a class of documents which should, in all but exceptional circumstance, remain within the confidence of taxpayers and their professional accounting advisors". These exceptional circumstances include the following: (1) suspicion of fraud, evasion or other offenses; (2) where the source documents do not provide sufficient information to properly evaluate a taxpayer's arrangements; and (3) where source documents have been lost or destroyed or are otherwise unavailable"

the case in Canada. Failure to comply with an order under section 231.2 may lead to prosecution under subsection 238(2) or the issuance of a compliance order under section 231.7. Either case will result in a compliance order made. As the procedural discussion is beyond this paper, nothing further will be said; however, the distinction between provisions is set out by *Misutka* in his 2012 paper "*Select Issues Related to Solicitor-Client Privilege*".[74]

B. The Judiciary's Consideration of the Legislation - *Tower*

The Federal Court of Appeal ("**FCA**") in *Tower v. Minister of National Revenue*[75] considered subsection 231.2(1) and the ability of an accountant to refuse to answer questions set out in a requirement. The Court held that the Minister may issue a requirement for certain information containing "knowledge or facts" and may require this information to be delivered in a certain form.[76] Specifically, the "the Minister is [...] 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)."[77]

The Court also considered whether an accountant had the right to redact confidential references and information in respect of persons other than the taxpayer from the documents to be delivered to the CRA in response to the requirement. The Court did not entirely address the issue as it was, ultimately, discovered to be moot for the purpose of the taxpayer's appeal.[78] However, the Court did recognize that there was a certain line of cases that supported the assertion that a requirement is not

---

73 See, for example, *Tax Administration Act 1994,* sections 20B-20G; *CBA Newsletter, supra*, note 1*:* "In 2005, NZ introduced a statutory non-disclosure right for certain communications between tax advisors and their clients. Tax advisors must be members of an advisor group approved by NZ Inland Revenue. Documentary communication between tax advisors and their clients is protected if the main purpose for creation of the document was to give or receive tax advice on tax laws. Exclusions are for information of a factual nature, accounting and tax work papers, non-tax advice such as valuation and investment advice, matters relating to debt recovery and illegal or wrongful acts

74 *Misutka*, *supra*, note 8 at 7:7.

75 See *Tower v. Minister of National Revenue*, 2003 FCA 307, 2003 DTC 5540. [*Tower*] Please note that the Federal Court of Appeal in *Tower* considered the issue of whether material prepared by a tax-accountant who provided tax advice to a client was privileged. This part of the decision is further discussed below.

76 *Ibid*. at paragraph 20.

77 *Ibid*.

78 Note that the issue brought before Trial was that the Appellant had asked the Applications Judge for permission to redact names or information from certain material if it became necessary to protect confidential third party information. The Applications Judge agreed with this proposal. However, once the Appellant assembled the documents, it was discovered that there was nothing to be redacted. The Federal Court therefore felt that it was 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.

invalid merely because it results in the disclosure of private transactions involving persons who are not under investigation and who may not be liable to tax.[79]

The third issue considered was whether specific requirements issued by the Minister were within the meaning provided for in subsection 231.2(1). The Court held that a taxpayer's tax liability was a purpose related to the administration and enforcement of the Act and, therefore, the requirement at issue was valid. This point is important in relation to the discussion on working papers below.

> 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.
>
> 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 prescribed conduct has been engaged in, short of studying the process by which a suspected corporation or business has made and implemented its decision.[80]

Subsection 231.2(1) provides the Minister with a low threshold (*i.e.* that documents must only be relevant to determining tax liability) and broad authority to obtain information from individuals, including accountants, regarding a taxpayer's tax liability.[81] The Minister clearly has a wide array of legislative options to compel production of financial records from taxpayers, which courts have not generally restricted the breadth of beyond requiring that the Minister's demands must be relatable to the administration and enforcement of the Act. As stated in *Tower*, this authority is much broader than that provided for when conducting pre-trial examinations for discovery in the context of an income tax appeal.[82] It empowers the Minister with investigative authority greater than that within the fact finding procedure. The provision, unduly, places an easily met onus on the Minister to prove the

---

79 *Tower*, *supra*, note 75. Please note that the line of cases that the court referred to are the following: *Canadian Bank of Commerce v. Canada (Attorney General)* (1962), 35 DLR (2d) 49 (SCC) at 54; *James Richardson & Sons Ltd. v. Minister of National Revenue* (1984), 9 DLR (4th) 1 (SCC) at 7; and *R v McKinlay Transport Ltd.*, [1990] 1 SCR 627 (SCC) at 16.

80 *Tower*, *supra*, note 75.

81 Note that in order to issue a requirement under subsection 231.2(1) of the Act, the information must only be relevant to determining a taxpayer's tax liability.

82 *Tower, supra,* note 75 at para 29.

documents are relevant and, once met, on the contrary, shifts a heavy burden for the taxpayer to disprove the same.[83]

C. Jurisprudence Specific to Accountant-Client Privilege

(1) *Baron et al. v The Queen et al.*

The starting point for considering accountant-client privilege is *Baron*,[84] where the FCTD considered whether privilege applied to communications between an accountant and client. Specifically the Court was asked to whether documents subject to a search and seizure request under section 231.3 of the Act could be protected from disclosure by accountant-client privilege.

The Appellant argued that provincial law and the Chartered Accountants Code of Ethics provided for an accountant-client privilege in the context of litigation.[85] However, Reed J was not persuaded that provincial law or a professional code could apply to federal tax litigation:

> Even if I accept that the law of Quebec provides for an accountant-client privilege in the context of litigation. I am not persuaded that such a rule has been adopted with respect to federal income tax litigation. If such a rule was intended to apply one would expect to find it expressly so provided in either the *Canada Evidence Act* or the *Income Tax Act*.[86]

She considered the decision of *Missiaen v. Minister of National Revenue*,[87] where Primrose J stated "[c]ertainly, the chartered accountant with the client is in an analogous position to a solicitor and his client and it is rather strange that no privilege is accorded or claimed in such circumstances."[88] However, in response to *Missiaen,* Reed J recognized distinction between the communications relative to the fundamental purpose of solicitor-client privilege and the policy reasons why it exists.

> It is not at all strange that solicitor-client communications are privileged in so far as compellable evidence before the courts is concerned, while those between an accountant and client are not. The purpose of the solicitor-client privilege is to ensure free and uninhibited communications between a solicitor and his client so that the rendering of effective legal assistance can be given. This privilege preserves the basic right of individuals to prosecute actions and to prepare defenses. As Mr. Justice Lamer indicated, in *Descôteaux v. Mierzwinski*, […], at 883, the privilege is recognized because it is necessary for the proper administration of justice. I do not think there is an overriding policy consideration, of this nature, in the case of accountant-client communication. An accountant may, as a matter of professional ethics, be required to keep communications and other information

---

83 John Sorenson, "*Protecting Tax Accrual Workpapers, Revisited...Again*" (2013) 6:2 (Bordercrossings: Carswell). [*Sorenson*]

84 See *Baron et al. v. The Queen*, 90 DTC 6040 (FCTD) at 6054; aff'd at 91 DTC 5055 (FCA); Affirmed by the Supreme Court of Canada at 93 DTC 5018 without discussion of this issue.

85 *Chartered Accountants Code of Ethics*, RSQ 1977, c C-48 (section 3.02.25) and *Professional Code*, RSQ. 1977, c C-26, s 87(3).

86 *Baron, supra,* note 84 at para 34.

87 *Missiaen v Minister of National Revenue*, [1967] CTC 579, 68 DTC 5039.

88 *Ibid* at para 9.

> concerning his or her client confidential. But this is not founded upon a need to ensure an effective system of the administration of justice.[89]

The decision in *Baron* is important as it set out the distinction between solicitor-client privilege and the privilege that would exist if accountant-client privilege were recognized. Solicitor-client privilege is rooted in the protection of ensuring "free and uninhibited communications between a solicitor and his client".[90] Without an overriding policy reason as to why privilege should be extended, beyond the advice given by a tax-account being analogous to that of a tax-lawyer, there was no reason to implement what otherwise should be implemented by Parliament.

(2) *Tower v Minister of National Revenue*

Tower v. Minister of National Revenue[91] is also important for more reasons than those set out above: the Court considered the two forms of privilege in Canada (class and case-by-case) and reaffirmed that privilege does not extend to the communication from an accountant to a client.[92]

The Court rejected the assertion that the communications were protected by a "class privilege" on the basis that this issue had previously been decided by the Court in *Baron*[93] and that there was no reason to reconsider the distinction of the communications made by the two professions.[94] The Court was, therefore, left to consider whether a case-by-case privilege could apply. And in order for case-by-case privilege to attach, the *Wigmore Framework* must be satisfied.[95]

---

89 See *Baron*, *supra*, note 84 at para 36. Note that the FCA and the SCC overturned the lower court's decision but did not disturb the finding that privilege should not be extended to accountants.

90 *Ibid*.

91 *Tower*, *supra*, note 75.

92 Please note that in *Tower*, *supra*, note 75, the last of the four issues addressed was the Taxpayer's claim that communications pertaining to "tax advice" between a client and an accountant should be afforded privilege. Also see *Baron et al. v. The Queen et al.,* where the court initially affirmed that solicitor-client privilege did not extend to tax-advice provided by accountants.

93 *Baron*, *supra*, note 84.

94 See *Tower, supra, note 75* at para 38, where the Court stated:

> I see nothing in the submissions of the Taxpayers that militates against the earlier ruling rendered by this Court in *Baron v. R*., *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 […]. Lawyers are legally and ethically required to uphold and protect the public interest in the administration of justice […]. 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.

95 *Ibid* at paras 39 and 40. For reference the four *Wigmore criteria* are: (a) the communications must originate in a confidence that they will not be disclosed; (b) this element of confidentiality must be essential to the full and satisfactory maintenance

With regard to the first of the four criteria, the FCA considered the SCC's previous guidance on the "importance of the expectation of confidentiality".[96] Ultimately, the FCA held that since a tax-accountant should be aware that their communications do not have an expectation of privilege, but rather only the requirement of confidentiality under their professional code, the taxpayer had not discharged the onus of the first principle.

> 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 expectation of confidentiality, the raison d'être of the privilege is missing" (see *R. v. Fosty* , supra , at paragraph 39). 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.[97]

Similarly, the Court held that the taxpayer had not shown that confidentiality was essential to the maintenance and trust of the relationship nor as being essential to the proper functioning of society and the administration of justice.[98] The taxpayer could therefore not meet either the second or the third of the *Wigmore* criteria.

> 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.
>
> 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.[99]

To highlight the distinction between a solicitor-client relationship and that of a accountant and client, the Court outlined reasons as to why privilege is afforded to some relationships and not others.

> 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

---

of the relation between the parties; (c) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (d) 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.

96 See *Gruenke*, *supra*, note 28 at para 39

97 See *Tower*, *supra*, note 75 at para 41.

98 Please note that these two conditions make up the second and third considerations under the *Wigmore Criteria*.

99 See *Tower*, *supra*, note 75 at paras 42 and 43.

> 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.[100]

However, the Court stated the following about the accountant-client relationship:

> [t]he 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.[101]

Lastly, the Court held that the protection of the communications from disclosure did not outweigh the interest in getting at the truth and correctly disposing of the matter.[102] This step was a reflection of the "purely public policy considerations."[103] The high threshold to show that public policy outweighed the need for disclosure was framed in the light of the finding in *M. (A.) v Ryan*,[104] where the SCC determined that the emotional harm caused by the redress of the claim by a victim of sexual assault did not outweigh the need for its factual disclosure, ultimately leading to an unsuccessful claim of privilege.[105] In *Tower*, that same high threshold had not been met by the taxpayer as:

> 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.[106]

Internal CRA policy taken from the CRA Investigation Manual[107] provides that the CRA has unsurprisingly accepted the position of the Court in *Tower* as well as the principles set out in *Susan Hosiery*.. That is, there is no right of account-client privilege.[108]

> While the Court has confirmed there is no similar right of accountant-client privilege, where an accountant acts as an agent of the client for purposes of obtaining legal advice, the communications may be covered by privilege.

---

100 *Ibid* at para 44.

101 *Ibid*.

102 *Ibid* at para 45.

103 *Ibid*.

104 See *M(A) v Ryan*, [1997] 1 SCR 157 (SCC).

105 *Ibid* at para 30 and 32.

106 See *Tower*, *supra*, note 75 at para 46.

107 See *CRA Investigation Manual*, Investigation Policy 2010-06 — Acquiring Information from Taxpayers, Registrants and Third Parties, dated June 2010.

108 *Susan Hosiery*, *infra*, note 121.

(3) *Prudential PLC v Special Commissioner of Income Tax (UKSC)*

In *Prudential plc & Anor, R (on the Application of) v Special Commissioner of Income Tax & Anor,*[109] the UKSC confirmed that privilege does not extend to tax advice provided by accountants or to legal advice provided by other professionals. Although only persuasive for Canadian Courts, the decision is important due to its extensive discussion on the implications that would follow if a court were to extend the doctrine to non-legal professionals who provide legal advice. Specifically, the Court framed the issue as whether a class-based privilege should be extended to accountants:

> [W]hether, following receipt of a statutory notice from an inspector of taxes to produce documents in connection with its tax affairs,[110] a company is entitled to refuse to comply on the ground that the documents are covered by legal advice privilege (LAP), in a case where the legal advice was given by accountants in relation to a tax avoidance scheme.[111]

Lord Neuberger recognized that privilege is "a fundamental human right"[112] which could only be removed by statute expressly or by necessary implication through express language and logic.[113] He also recognized legal advice privilege is "founded upon 'the rule of law'" and exists to ensure "full and frank communication between lawyers and their clients which promotes broader public interests in the observance of law and administration of justice".[114]

In dissent, Lord Sumption suggested that privilege extend to situations where legal advice is ordinarily given by any profession. Lord Neuberger reasoned, and the majority agreed, that extending the privilege to non-legal professionals who ordinarily give legal advice would cause issue going forward for Courts faced with the decision of whether a specific profession is one which "ordinarily includes the giving of legal advice".[115] For example,

> …[m]any chartered surveyors, architects and accountants, for instance, may not ordinarily give legal advice, but there are many who do. Should the issue be judged by reference to the profession

---

109 *Prudential*, *supra*, note 3.

110 Note that, much like a requirement issued under subsection 231.2(1) of the Act, the taxpayer in *Prudential* was issued "a statutory notice to produce documents in connection with its tax affairs."

111 See *Prudential*, *supra*, note 3 at para 1.

112 *Ibid* at para 4.

113 *Ibid*. This principle was broadly described by Lord Hoffmann throughout the decision in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at paras 7 and 9 where it was stated that a statute could only remove such "a fundamental human right" if it "expressly stated" that it was doing so, or if the intention "appear[ed] by necessary implication", and, as Lord Hobhouse emphasized at paragraph 45, "[a] necessary implication is a matter of express language and logic not interpretation".

114 *Ibid* at para 21.

115 *Ibid* at para 57.

> generally, a particular branch of the profession (which could lead to definitional issues), or the practice of the particular member of the profession in the case, and, if this last possibility is correct, would the issue be determined on that member's say-so?[116]

The underlying considerations of the Court in *Prudential* were: (1) the inaction of Parliament to extend privilege to non-professionals that provide specialized legal advice; and (2) the uncertainty that would be created through such an extension.[117]

For these reason, among others, the decision to extend privilege was "a policy issue best left for Parliament".[118] The implications of extending the understood limits of privilege could have significant implication, which would be difficult for courts to identify, let alone assess. For that reason, as well as the consequences that in their totality could be considered by Parliament, Lord Neuberger held that the alteration should be left to the "legislative process, with its wide powers of inquiry and consultation and its democratic accountability."[119]

It is certainly true that Lord Neuberger recognized many of the reasons why, in the context of the United Kingdom, privilege should be extended to the tax-advice provided by accountants; however, these reasons in the aggregate were not strong enough to overturn the extensive common law that solicitor-client privilege should only apply to advice given by legal professionals.

D. Recommendations for the Application of Privilege in the Context of Accountants

Communications from an accountant to a client are not privileged, unless prepared by the accountant as a result of a request by the client's lawyer to be used in connection with litigation. Similarly, communications in the possession of a lawyer or client that are made by an accountant as

---

116 *Ibid*. Note that Lord Neuberger continued at paragraph 58 to explain his example "Consider cases such as (i) a town planner instructed to try and obtain planning permission for a development or to advise whether it was needed or what had to be done to get it, (ii) a pension consultant asked to advise on whether a payment could be made, or a contribution should be demanded, by trustees of a pension scheme, (iii) a valuation surveyor asked to advise on rental value under a rent review clause or for rating purposes, or (iv) an auditor asked as to the appropriate treatment of a receipt or debt. In each such case, the issue on which advice is sought may well involve a point of law on which the professional concerned is well qualified to advise. In each case, it could very well be open to argument whether LAP attached to such advice."

117 *Ibid* at para 52, where Lord Neuberger stated "I reach this conclusion for three connected reasons, which together persuade me that what we are being asked to do by Prudential is a matter for Parliament rather than for the judiciary. First, the consequences of allowing Prudential's appeal are hard to assess and would be likely to lead to what is currently a clear and well understood principle becoming an unclear principle, involving uncertainty. Secondly, the question whether LAP should be extended to cases where legal advice is given from professional people who are not qualified lawyers raises questions of policy which should be left to Parliament. Thirdly, Parliament has enacted legislation relating to LAP, which, at the very least, suggests that it would be inappropriate for the court to extend the law on LAP as proposed by Prudential."

118 *Ibid*. See the heading of the third subsection of the conclusion to Lord Neurberger's reasons.

119 *Ibid* at para 62.

the agent of the client are also privileged.[120] These principles were set out in *Susan Hosiery Ltd. v. Minister of National Revenue.*[121]

In *Re Goodman and Carr et al*,[122] the Court affirmed these principles; however, the Court built on the discussion from *Susan Hosiery* regarding the documents that could be included and, ultimately, determined that privilege did not extend to a letter and memorandum sent by an accountant to the client's lawyer unless a threshold of doing so for a certain legal purpose was met. The Court held that the fact that, at the client's request, the accountant forwarded these documents to the solicitor was insufficient to bring them within an exception to the rule that documents emanating from a third party are unprotected.[123]

However, in *Mutual Life Assurance Company of Canada v The Deputy Attorney General of Canada,*[124] a memorandum prepared jointly by chartered accountants and lawyers respecting tax advice was sent under the letterhead of the law firm to its client. In this case, the Court found that solicitor-client privilege did exist.[125]

The Court in *Imperial Tobacco*[126] considered the decision in *Mutual Life Assurance* in regards to documents which the Appellant claimed privilege over. In finding that the documents were not privileged, the Court highlighted the distinction in factual circumstances between that case and the case at issue: the advice provided in *Mutual Life Assurance* was found to be entirely provided by the

---

120 As discussed above, the privilege asserted in this case would be "litigation privilege".

121 See *Susan Hosiery Limited v MNR*, [1969] CTC 353 at para 11 [*Susan Hosiery*].

122 See *Re Goodman and Carr et al*, [1968] CTC 484 (SCO).

123 See, generally, *Susan Hosiery, supra*, note 121.

124 See *Mutual Life Assurance Company of Canada v The Deputy Attorney General of Canada*, [1984] CTC 155 (SCO) ["*Mutual Life Assurance*"].

125 Note that the basis for granting solicitor-client privilege appeared to be that the solicitors, by sending the memorandum with a covering letter, accepted responsibility for "the very considerable amount of legal advice contained in it" and because the advice "could be described as legal in that it involves advice as to the impact of the income tax laws". However, the Court noted that it was impossible to tell which portion of the memorandum was attributable to the chartered accountants and which portion was attributable to the solicitors.

126 *Imperial*, *supra*, note 7.

law firm. That is they were "responsible for the entire document".[127] This was, however, "not the fact situation in front of [the Court]" in *Imperial Tobacco*.[128]

These decisions must be contrasted with the following two that considered the waiver of privilege when providing documents to a third-party in the context of auditors. In *Philip Services Corp. v Ontario (Securities Commission)*,[129] the Court considered whether providing confidential documents for the limited purpose of an audit is a waiver of solicitor-client privilege. The Court held that an auditor's relationship with a corporation under audit is confidential and is a statutory obligation for public companies and not a voluntary relationship. The court stated that:

> It is true […] that in *Interprovincial*, the giving of the documents was accompanied by statements intended to protect privilege. In my view, that does not affect the basis of the decision, that disclosure to the auditors for their purposes is not properly disclosure to the world, because of the great importance of the solicitor-client privilege to the proper functioning of the legal system. The documents were sought […] because Deloitte was the auditor and were [provided] in that capacity. It would be contrary to the basis of the decisions in *Descôteaux*, supra, and *Lavallee*, infra, to extend the scope of that disclosure to the world.[130]

The Court in *Philips* referenced the decision in *Interprovincial Pipe Line Inc. v MNR*,[131] which also adopted the doctrine of limited waiver, and held that the disclosure to an accountant was not a waiver of privilege for any purpose other than "to assist in the conduct of the audit and examination of its financial statements. It made the legal opinions available in accordance with its duty to assist that can be drawn from subsection 170(1) of the *Canada Business Corporations Act."*[132]

E. Accountant-Client Privilege Relative to the Common Law

The discussion for the extension of privilege to tax-accountants makes sense when considered without a legal analysis of the principles fundamental to the doctrine of privilege in Canada. Although it is true that tax-accountants provide similar advice to clients as that provided by a tax lawyer, under the Canadian common law, similarities regarding the services are not recognized as a legal basis for the

---

127 *Ibid* at para 74.

128 *Ibid*. at para 75.

129 *Philip Services Corp. v Ontario (Securities Commission)*, 77 OR (3d) 209 (Ont Gen Div).

130 *Ibid* at para 47.

131 *Interprovincial Pipe Line Inc. v MNR*, 49 DTC 5642 (FC).

132 *Ibid* at paras 16 to 18.

extension of privilege. Courts have, therefore, been unable to find a principled approach to protecting from disclosure tax-advice given by accountants.[133]

It is interesting to note that in *Prudential* the United Kingdom Supreme Court seemed close to recognizing the protection of advice provided by a tax-accountant; however, the Court could not find a policy reason to alter the common law to disrupt the existing principles of privilege. The Court's reasoning expressly stated that it was concerned about the issues that would surely arise with its extension.[134] Therefore, the extension was to be an issue dealt with by Parliament.

Relating the decision in *Prudential* to the Canadian context, there are distinctions in our legislation that would not provide as strong of a basis for the extension of accountant-client privilege. For example, in Canada, non-legal professionals generally are precluded from providing legal advice by legislation governing the legal profession in the provinces.[135] Therefore the position taken by the parties in *Prudential* would not, likely, be sustainable in Canada.[136]

However, many commentators have expressed that this distinction in advice that otherwise seems quite similar has created a disincentive for taxpayers to solicit tax-advice from accountants as opposed to tax lawyers.[137] Adam Dodek, in his 2011 paper on privilege[138] argues that "[t]his has led to taxpayers turning to lawyers with their tax problems, rather than specialized tax accountants, in order to have those communications protected by evidentiary privilege." I disagree with this point as not all advice provided to taxpayers requires the protection from disclosure that follows advice from a tax

---

133 Canadian Courts have consistently not extended privilege to accountants after considering the relevant common law. *Sorenson*, *supra*, note 77, "the question is not so much whether in one particular area of professional practice an accountant offers services that appear […] to be the same as those coming from a tax lawyer, but rather whether the role of a lawyer offering tax advice is something that, to use *Wigmore's* turn of phrase, should be "sedulously fostered." If in answering this question the conclusion is that lawyers are really not anything special in terms of what their profession offers and do not provide services to clients worthy of protection from disclosure, then the issue of whether accountants should similarly benefit from a privilege resolves itself."

134 *Prudential*, *supra*, note 3 at para 63.

135 See, for example, section 106 of the *Legal Profession Act of Alberta*, RSA 2000, Chapter L-8.

136 See Sarah Chiu, "*United Kingdom Supreme Court confirms privilege is only for the clients of lawyers*" (2013), National Tax Insights, CBA National Taxation Section Newsletter.

137 See, for example, Paul D. Paton, "*Accountants, Privilege, and the Problem of Working Papers*" (2005) 28 Dalhousie L.J. 353.

138 See Adam Dodek, "*Solicitor-Client Privilege in Canada: Challenges for the 21st Century*" Discussion Paper for the Canadian Bar Association, February 2011.

lawyer. It is possible for a taxpayer to solicit advice of only how to proceed and fulfill their obligations to the tax authorities. Advice from accountants fills the gap.

However, when facing a tax-dispute, taxpayers often do turn to tax-lawyers rather than tax-accountants to receive privileged advice. I argue that this is for reasons beyond the mere extension of privilege to one professional and not the other. To deny this would be to discredit many factors, such as the training provided by a legal education and experience that is obtained from working within the profession. It would be akin to the false claim that a book keeper is as capable as an accountant at the functions fundamental to that profession.

There is no question that Brian Arnold is correct in this statement:

> The legal profession – law societies, law firms and especially law schools – [has] done an abysmal job of supplying sufficient numbers of tax lawyers to do all of the necessary work. Through their ignorance about the nature and importance of tax as law, they have essentially abdicated the field to accountants.[139]

However, with respect, I disagree with him on the following point:

> Moreover, there are no strong arguments for restricting privilege to tax advice provided by lawyers. The restriction is nothing more than an anti-competitive measure that operates unfairly against accountants but more importantly, against Canadian taxpayers seeking their advice.[140]

A lawyer receives training in the realm of statutory interpretation, the development of the common law, and within numerous areas of practice that intersect with tax law.[141] All of which afford training to give advice distinct from that of a tax-accountant. It is true that the two sides do often come to similar conclusions and, ultimately, do provide advice similar to one another. However, the considerations undertaken to arrive at these conclusions should be distinct from one another.

Contemplation of litigation begins at the tax planning stage, not upon the issuance of a (re)assessment.[142] If correct, the mere fact that accountants are unable to represent taxpayers at the

---

139 See Brian Arnold, *The Arnold Report* (ctf.ca) #056 (Sept. 10, 2013). <https://www.ctf.ca/ctfweb/EN/Newsletters/Canadian_Tax_Focus/2012/3/120311.aspx>

140 *Ibid*.

141 For example, trust law, which is undeniably important in the realm of tax planning. The same could be said for familiarity with the operation of corporate law principles relative to the law of taxation.

142 Ed Kroft, "*Tax Administration and Litigation"*, class discussion, February 11, 2014, Osgoode Hall. In a discussion concerning when dispute resolution in the context of tax litigation commences, the position was put forward that dispute resolution begins concurrently with tax planning. See Pooja Samtami and Justin Kutyan, "*Special Report: Tax Litigation Demystified*", Canadian Tax Journal (2011) 59:3 at 528 [*Kutyan*].

Tax Court should be an essential part of the consideration given to the planning from the onset.[143] That is, legal advice provided to taxpayers with the expectation of confidentiality retains its confidentiality even in the context of a tax audit, objection, or a Tax Court Hearing.

For example, a taxpayer who has been issued a (re)assessment is inherently contemplating dispute resolution proceedings from the moment they visit a tax-professional for advice, which may or may not be in regard to litigation. Would it not be more beneficial if considerations critical for the litigation process are included from the outset of the planning?

For example, in *McKesson Canada Corporation v The Queen*,[144] over 62 days of evidence was provided by 34 witnesses with 23 agreed statements of fact. And in *Cameco Corporation v The Queen*,[145] counsel spent 14,000 hours on producing documents. It is hard to argue that when the dollar figures at stake are large enough to incite such fervent pursuit by the Minister of extraordinary amounts of evidence that it would not be beneficial the taxpayer, financially at the very least, to have the required evidence considered in the legal context as the planning begins. Clearly, however, a tax lawyer retained for tax planning advice will not always litigate if the plan is challenged; still, a lawyer is better suited to prospectively consider a challenge by the CRA in the context of litigation strategy from the outset. These considerations may be regarding the Rules of Evidence, litigation strategy, or specifically, the evidentiary requirements for documents to be admitted.[146]

Therefore, taxpayers who undertake tax planning should consider the potential challenges that a plan may face and govern accordingly. If a taxpayer determines that the plan will likely be challenged, although it operates within the confines and spirit of the law, a taxpayer may choose to proceed to a tax lawyer for advice. It is this very form of advice that should be protected. Taxpayers should be able to seek advice from a tax lawyer as to how the CRA may view the steps undertaken by a taxpayer. This would be akin to an individual seeking advice regarding their actions relative to the criminal code.

---

143 Under subsection 17.1(1) of the *Tax Court of Canada Act*, RSC, 1985, c T-2, a party may only be self-represented or represented by an Officer of the Court, as defined within subsection 17.1(2). Note that this statement, however, does not extend to informal procedure cases.

144 *McKesson Canada Corp. v R*, 2013 TCC 404 (Tax Court of Canada [General Procedure]).

145 *Cameco Corp. v R* 2014 TCC 45 (Tax Court of Canada [General Procedure]).

146 See *Kutyan*, *supra*, note 142 at 528.

Taxpayers should be entitled to receive interpretations of the law without fearing the consequence of disclosing their affairs. If the affairs so warrant, this advice is best suited to come from a lawyer.

F. Accountant Client Privilege in Relation to Working Papers

On the basis of the above there are a few interesting points regarding the working papers of accountants that may be relevant to practitioners going forward:

(4) There is no requirement at law to keep working papers in a taxpayer's files after they have fulfilled their purpose. Working papers are probably relevant to a CRA audit; however, they are not books and records of a taxpayer under section 230 of the Act. Although tax payable should likely be determinable by reference to a taxpayer's accounting records and source documents, working papers are interpretations or opinions regarding how supportable at law a tax position would be based upon information in the taxpayer's books and records.

(5) The statutory power to audit, inspect or examine any document of the taxpayer or of any other person that relates to the information that is in the books and records of the taxpayer may potentially be wide enough to capture the working papers of accountants if they are preserved in the files of a taxpayer.

(6) If compellable by the CRA, the free sharing of working papers between taxpayers, their accountants and their external auditors would be impinged;

(7) If working papers were held by a court to be an accounting or business exercise, privilege would not apply regardless of whether lawyers were involved in the exercise. The exercise to determine whether they were privileged would be fact-dependent and based upon the degree of the lawyer's involvement;[147] and

(8) Pursuant to section 232 *Act*, a lawyer shall not be convicted for having refused to communicate a document or information in accordance with the *Tax Administration Act* if he establishes, to the satisfaction of the Court, that he had reasonable grounds to believe that the document or information was protected by professional secrecy and if he stated his refusal to the Minister or any person designated for that purpose by the Minister. [148]

In practice, it is not uncommon for CRA audit letters to be sent to taxpayers asking for the production of legal opinions or correspondence from legal counsel. An unsophisticated client may respond to these requests without understanding their right to privileged communication.[149] In this situation, it is recommended that it should be made clear to the CRA that the provision of the privileged information does not amount to waiver, and that the subsequent use of such information in

---

147 *Sorenson*, *supra*, note 83. Note that the "interesting points" listed above are discussed by Sorenson. However, I have added additional commentary to these points to reflect my sentiment on their applicability.

148 Section 232(2) of the Act - "Solicitor-client privilege defence".

149 *Misutka, supra,* note 8 at 7:12.

support of a reassessment could support an application to strike assumptions from a reply to a notice of appeal filed by the Minister in response to a Tax Court appeal.[150]

G. Practice Points

There clearly is uncertainty in the compellability of some documents. However, it is possible for taxpayers to take some steps to mitigate the risk of the disclosure of these documents. The following points should be implemented throughout the tax planning/litigation process:

(1) Involving experienced legal counsel early in the planning process to determine tax exposure will help a taxpayer ascertain the likelihood of the Minister to pursue investigation of the plan. The Minister pursues "low-hanging fruit" with greater fervour than that of a tax-plan protected by privilege under experienced tax counsel.

(2) Written documentation for the accountant to act as an agent of the client for all communications between an accountant and a lawyer should exist. It is important that the request for work by an accountant be made by the client. However, the communication must have come into existence for the purpose of obtaining legal advice.

(3) For the purpose of asserting litigation privilege, the dominant purpose of producing the document must be to obtain legal advice or for the purpose of litigation.[151]

(4) Working papers such as legal opinions should be isolated and labeled "confidential and privileged" by the party holding the documents on the taxpayer's behalf. Ideally, during an on-site audit, documents should be held in a separate room behind a locked door that a CRA Auditor would not have access to for any reason.

(5) Seek to prevent outside parties, such as external auditors, from obtaining hard copies of working papers or opinions to avoid the claim of waiver of privilege by the Minister as well as the necessity of defending privilege on the basis of the limited waiver doctrine.

(6) If a taxpayer wishes to rely on the doctrine of limited waiver, it is prudent to document the intention in writing. However, inadvertent disclosure without the clients consent should not waive privilege.[152]

(7) Deliberate disclosure of documents to an audit team not mandated by a statutory obligation will cause privilege to be waived. External auditors should be instructed to issue a written demand for all documents that are intended to be privileged.[153]

(8) Lawyers have a duty to ensure that privilege is not waived or not deemed to be waived for any document that the lawyer honestly believes to be privileged. To fulfill this duty, a lawyer may ask a court to clear the document from such privilege. [154]

(9) Seek to ensure that documents held by external parties are destroyed if/when they are no longer needed. This should not violate section 230 of the Act.[155]

---

150 *Ibid* at 7:13.

151 See *Deloitte & Touche Inc. v Canada* (Attorney General), 97 DTC 5520 (FCTD); See Colin Campbell, *supra*, note 57 at 327.

152 See *Interprovincial Pipeline Inc.*, *supra*, note 131. If the taxpayer must disclose working papers to external auditors, confirm that they will not release them to the CRA without the taxpayer's express consent. Written confirmation should be solicited by the taxpayer confirming the intention of the taxpayer to not have these documents disclosed for any purpose.

153 *Ibid*, *Interprovincial Pipelines Inc.*, *supra*, note 131. See also *Colin Campbell, supra,* note 57 at 316.

154 See *Lagasse v Canada (Deputy Attorney General);* See also *Colin Campbell*, *supra*, note 57 at 316.

These principles highlight the dichotomy regarding the application of privilege to tax advice. On one hand, both the accounting profession and the tax community are moving toward greater transparency to alleviate the uncertainty of tax planning relative to the tax authority's administrative positions; while, on the other hand, the accounting community continues to push for the right to non-disclosure of certain taxpayer documents. The problem is then multiplied by tax authorities (*i.e.* the CRA) continuing to push early disclosure obligations onto taxpayers who participate in aggressive tax planning schemes.[156] Perhaps it is the composite mess, as a whole, that has convinced Parliament to "stay out of it" instead of disrupting the current working relationship.

IV. CONCLUSION

A taxpayer's right to solicitor-client privilege is protected because of the importance of privilege to the functioning of the legal system as a whole.[157] However, as stated above, it is not uncommon for CRA audit letters to be sent to a taxpayer asking for the production of legal opinions or correspondence from legal counsel. Therefore, the importance for tax practitioners to have a comprehensive knowledge of the legal principles relating to privilege cannot be understated.[158] Moreover, it is important to advise clients of the practical benefits of privilege before it is too late.

Against the backdrop of jurisprudence, the SCC has issued several decisions in recent years which challenge the notion that solicitor-client privilege is a matter of procedure.[159] It is a principle of fundamental justice and a civil right of supreme importance in Canadian law. Therefore, the exercise of balancing privacy interests and the exigencies of the enforcement of the Act is not helpful; privilege is a positive feature of the tax administrative enforcement procedure, not an impediment to it. For this

---

155 *Ibid*. Note that some of these steps have been taken from John Sorenson's paper; however, I have added points of my own to add to those made by John Sorenson.

156 *Sorenson*, *supra*, note 83. Privilege is sought by the community to protect the communications of taxpayers from the early disclosure requirements pushed for by the CRA, and on the other, the tax community as a whole is looking for greater transparency in the taxpayers, accounting standards, and the revenue authorities.

157 *Misutka*, *supra*, note 8 at 7:13.

158 *Ibid* at 7:2.

159 Brandon Kain, *Solicitor-client Privilege and the conflict of laws,* Canadian Bar Review (2011) 90:2. <http://www.mccarthy.ca/pubs/Solicitor_Client_Privilege_and_the_Conflict_of_Laws.pdf>

reason, it must be remembered that solicitor-client privilege should remain as close to absolute as possible in order to retain its relevance. Courts have adopted stringent norms to ensure its protection.

If privilege is to extend to advice provided by an accountant, it will be a decision made by Parliament implementing legislative reform.[160] As I have outlined, the common law has effectively precluded the court from protecting communications with accountants from disclosure unless it falls within the exceptions set out within *Susan Hoisery.*[161] Over the past decade, the SCC has entrenched privilege as a fundamental principle of justice. And therefore, it is unlikely that this position will be altered any time soon.[162] For tax practitioners, the importance of recognizing the strength of privilege relevant to taxpayer disputes cannot be understated. With the application of privilege, taxpayers hold a distinct advantage in the dispute resolution process.[163]

Two practice points are highlighted from this, each of which should be viewed by the tax community as an ongoing obligation: (1) tax practitioners should remind clients that advice from accountants which may be relevant to court proceedings or to the Minister's ability to issue an assessment will likely be producible and will generally be subject to scrutiny; and (2) clients using the services of tax practitioners should remind themselves to question their affairs and govern the administration of who provides advice accordingly. It is clearly important that communications with accountants and other experts are carefully managed. Moreover, tax practitioners should discuss the concept of privilege with clients at the beginning of litigation so clients are alive to the issues surrounding claims of privilege and the proper use of privilege to protect their legal communications.

---

160 See Paul Paton, "*Accountants, Privilege, and the Problem of Working Papers"*, 2005.

161 *Susan Hosiery*, *supra*, note 121.

162 *Misutka*, *supra*, note 8 at 7:14.

163 *Ibid.*

V. BIBLIOGRAPHY

Legislation

Canada Evidence Act, RSC, 1985, c C-5.

Chartered AccountantsCode of Ethics, RSQ 1977, c C-48.

Income Tax Act (Canada), RSC, 1985, c 1 (5th Supp).

Internal Revenue Code, section 7525.

Legal Profession Act of Alberta, RSA 2000, Chapter L-8.

Professional Code, RSQ 1977, c C-26, s 87(3).

Tax Administration Act 1994 (New Zealand), s. 20B-20G.

Tax Court of Canada Act, RSC 1985, c T-2.

Jurisprudence

Archean Energy Ltd. v Minister of National Revenue (1997), 98 DTC 6456 (Alta QB).

A(LL) v B(A), [1995] 4 SCR 536.

Baron et al. v. The Queen, 90 DTC 6040 (FCTD).

Blank v Canada (Minister of Justice), 2006 SCC 39, [2006] 2 SCR 319.

Cameco Corp. v. R 2014 TCC 45 (Tax Court of Canada [General Procedure])

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44.

Canadian Bank of Commerce v. Canada (Attorney General) (1962), 35 DLR (2d) 49 (SCC).

Chambre des notaires du Québec c. Canada (Procureur général), 2010 CarswellQue 9351, 2010 QCCS 4215

College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner). 2002 BCCA 665.

Descôteaux c Mierzwinski, [1982] 1 SCR 860 (SCC).

Dos Santos v. Sun Life Assurance Co. of Canada, 2005 BCCA 4.

Fraser Milner Casgrain LLP v. Minister of National Revenue, 2002 BCSC 1344, 2003 DTC 5048 (BCSC).

General of Canada, et al. v Royal Commission (Health Records), [1981] 2 SCR 494.

Global Cash Access (Canada) Inc. v. R, 2010 TCC 493, [2010] GSTC 145 (TCC [General Procedure])

Imperial Tobacco Canada Ltd v R 2013 TCC 144.

In Missiaen v. Minister of National Revenue, [1967] CTC 579, 68 DTC 5039.

Interprovincial Pipe Line Inc. v MNR, 49 DTC 5642 (FC).

James Richardson & Sons Ltd. v. Minister of National Revenue (1984), 9 DLR (4th) 1 (SCC).

Lavallee, Rackel & Heintz v Canada (Attorney General)

Lagasse v Canada (Deputy Attorney General)

M(A) v Ryan, [1997] 1 SCR 157 (SCC).

McKesson Canada Corp. v R, 2013 TCC 404 (Tax Court of Canada [General Procedure])

Mutual Life Assurance Co. of Canada v Canada (Deputy Attorney General), [1984] CTC 155 (SCO).

Philip Services Corp. v Ontario (Securities Commission), 77 OR (3d) 209 (Ont Gen Div).

Prudential plc & Anor, R (on the Application of) v Special Commissioner of Income Tax & Anor [2013] UKSC 1.

R v Dunbar, [1982] OJNo. 581, 68 CCC (2d) 13 (Ont CA).

R v Gruenke, [1991] 3 SCR 263

R v McClure, 2001 SCC 14. *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563

R v McKinlay Transport Ltd., [1990] 1 SCR 627 (SCC).

R v O'Connor, [1995] 4 SCR 411.

R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] UKHL 21, [2003] 1 AC 563

Re Missiaen et al, [1967] CTC 579 (Alta SC).

Re Goodman and Carr et al, [1968] CTC 484 (SCO).

Smith v Jones, [1999] 1 SCR 455.

Solosky v R, (1979), [1980] 1 SCR 821 (SCC).

Susan Hosiery Limited v MNR, [1969] CTC 353.

Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610 (UK).

Tower v Minister of National Revenue, 2003 FCA 307, 2003 DTC 5540.

Upjohn Co v United States (1981) 449 US 383, 389 (US).

Secondary Sources

Adam Dodek, "*Solicitor-Client Privilege in Canada: Challenges for the 21st Century*" Discussion Paper for the Canadian Bar Association, February 2011.

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

Brandon Kain, *Solicitor-client Privilege and the conflict of laws,* Canadian Bar Review (2011) 90:2. <http://www.mccarthy.ca/pubs/Solicitor_Client_Privilege_and_the_Conflict_of_Laws.pdf>

Brian Arnold, *The Arnold Report* (ctf.ca) #056 (Sept. 10, 2013). <https://www.ctf.ca/ctfweb/EN/Newsletters/Canadian_Tax_Focus/2012/3/120311.aspx>

Canadian Bar Association, "Accountants' Privilege" CBA Newsletter: Legal and Governmental Affairs, November 2013.

Colin Campbell, *Administration of Income Tax 2013*, (Carswell: 2013)

Dan Misutka, *Select Issues Related to Solicitor-Client privilege*, in Tax Dispute resolution, Compliance, and Administration in Canada, Proceedings of the June 2012 Conference (2013) (Toronto, Ont: CTF, 2012).

David Paciocco and Lee Stuesser, *The Law of Evidence* (Ontario: Irwin Law, 1996)

David Sherman's Notes — Income Tax Act, 232(3).

Gabe Hayos, CPA President's Note: *Freedom of choice: Taxpayers' right to confidential tax advice* (CPA Canada:2013)

Ed Kroft, "*Tax Administration and Litigation"*, class discussion, February 11, 2014, Osgoode Hall.

John Sorenson, "*Protecting Tax Accrual Workpapers, Revisited...Again"* (2013) 6:2 (Bordercrossings: Carswell).

Pooja Samtami and Justin Kutyan, "*Special Report: Tax Litigation Demystified*", Canadian Tax Journal (2011) 59:3.

Sopinka, Lederman & Bryant, "*The Law of Evidence in Canada"*, 3rd Ed (LexisNexis Canada:2009).

P. Paton, "Accountants, Privilege, and the Problem of Working Papers" (2005) 28 Dalhousie LJ 353.

Wigmore, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision.

Government Documents

CRA Conference 2009-0316711C6 — CLHIA 2009 — *Accountants' Working Papers*.

CRA Investigations Manual Policy - 2010-06 - Acquiring Information from Taxpayers, Registrants and 3rd Parties.

CRA Audit Manual,

CRA Round Table, 2010 Cdn Tax Foundation conference report, q. 26. At p. 4:25-26.

Technical Note 232(3.1).

Technical Note 232(3).