*The Requirement of Confidentiality Under the Income Tax Act and Its Effect on the Conduct of Appeals Before the Tax Court of Canada**

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PRÉCIS

Le Parlement a reconnu que la confidentialité des renseignements sur les contribuables obtenus par le Ministre du Revenu national est un élément important pour le fonctionnement d'un régime fiscal d'autocotisation. Cependant, le Parlement a également reconnu que la nécesité d'assurer la confidentialité de ces renseignements doit être conciliée à la nécessité pour le Ministre du Revenu national d'utiliser ces renseignements dans le cadre de poursuites visant l'application et de l'exécution de la Loi de l'impôt sur le revenu. Cette conciliation est possible grâce à l'article 241 de la Loi de l'impôt sur le revenu, lequel contient une interdiction générale sur la communication de renseignements confidentiels, une restriction sur l'obligation pour les fonctionnaires de témoigner dans le cadre de poursuites judiciaries relativement à des renseignements confidentiels et deux catégories d'exemptions. Selon la première catégorie, des renseignements confidentiels peuvent être communiqués pour des buts spécifiques à divers ministères fédéraux et provinciaux. Selon la deuxième catégorie, les poursuites criminelles et les poursuites ayant trait à l'application et à l'exécution de la Loi de l'impôt et de certaines autres lois fédérales sont entièrement exclues tant de l'interdiction de communiquer des renseignements que de la restriction imposée sur l'obligation pour les fonctionnaires de témoigner dans le cadre de ces poursuites. Comme l'auteur le mentionne, la manière dont la Couronne

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** Counsel, Department of Justice (Canada), Edmonton Regional Office. I am grateful to my colleagues for their comments and suggestions, and to Ms Phyllis Kitchen for her patience in typing numerous drafts of this article. All views expressed in the article are my own and do not necessarily represent the position of the Department of Justice. As well, responsibility for any errors or omissions is mine alone. The opinions expressed reflect the state of the law as of May 23, 1996.

traite la communication de renseignements confidentiels dans le cadre de poursuites exemptées peut toucher considérablement l'efficacité et l'intégrité du régime d'autocotisation sur lequel la Loi de l'impôt sur le revenu est fondée.

ABSTRACT

Parliament has recognized that the confidentiality of information obtained by the minister of national revenue in respect of taxpayers is an important element in the operation of a self-assessment system of taxation. However, Parliament has also recognized that the need to keep such information confidential must be balanced against the need of the minister of national revenue to use this information in proceedings for the administration and enforcement of the Income Tax Act. This balance is achieved through section 241 of the Income Tax Act, which contains a general prohibition against the disclosure of taxpayer information, a restriction on the compellability of officials to testify at legal proceedings in respect of such information, and two categories of exemptions. The first category allows taxpayer information to be disclosed for specified purposes to various federal and provincial government departments. The second category completely exempts criminal proceedings and administrative and enforcement proceedings under the Income Tax Act, and certain other federal enactments, from both the prohibition against disclosure and the limit placed on the compellability of officials to testify at such proceedings. As the author discusses, how the Crown handles the disclosure of taxpayer information in the course of exempted proceedings can significantly affect the efficacy and integrity of the system of self-assessment on which the Income Tax Act is based.

INTRODUCTION

When taxpayers file returns of income with the minister of national revenue, they generally do so with the expectation that the financial and private information they disclose will be kept confidential. Richard Green likely captured their feelings when he wrote:

> The annual or quarterly outpouring to the confessional in Ottawa is thought, by the confessors, to be veiled in the utmost secrecy. The foundation of these beliefs is uncertain. Presumably it is the statutory provisions of "secrecy" in the Income Tax Act itself. In any event, the general belief would appear to be that income tax returns are confidential and have always been so.[1]

However, as Mahoney JA recently stated in *Canada (Attorney-General) v. Bassermann*:

> Many Canadian taxpayers will be surprised to learn that, as a result of an order routinely made by the Tax Court of Canada, their personal income

[1] Richard A. Green, "The Confidentiality of Income Tax Returns" (1972), vol. 20, no. 6 *Canadian Tax Journal* 568-96, at 568-69.

> tax returns may be rummaged through by someone they have done business with who has a disagreement with the Minister of National Revenue. I was. They may think their personal returns are matters of confidence over which they should have some say but they will have no notice that the Minister might be ordered to divulge them. They may think that the Minister will protect that confidentiality but they are not likely aware that, if he does, he risks forfeiting the revenue he claimed.[2]

The purpose of this article is to revisit the question of confidentiality under the Income Tax Act[3] and to examine the extent to which information about a taxpayer obtained by the minister of national revenue for the purposes of the Act is confidential, particularly in the context of appeals from assessments of income tax.

APPEALS TO THE TAX COURT OF CANADA

A variety of legal proceedings are authorized under the Income Tax Act. For example, part XV makes provision for the recovery of debts owing to the Crown[4] as well as the prosecution of taxpayers for tax evasion.[5] The right to appeal from assessments of tax, interest, and penalties is set out in part I.[6] The same right of appeal, "with such modifications as the circumstances require," is given to persons assessed under other parts of the Act.[7] While both the Federal Court—Trial Division and the Tax Court of Canada are empowered to hear tax appeals commenced before January 1, 1991,[8] only the Tax Court of Canada has the jurisdiction to hear appeals filed on or after that date.[9] Appeals to the Tax Court of Canada commenced after December 31, 1990 are dealt with pursuant to the informal or general procedures of the Tax Court of Canada Act.[10] Section 18 of this Act authorizes an appeal under the informal procedure where

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[2] (1994), 114 DLR (4th) 104, at 105 (FCA).

[3] RSC 1985, c. 1 (5th Supp.) as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this article are to the Act.

[4] Section 222.

[5] Sections 238 and 239.

[6] Section 169.

[7] For example, see subsections 180.1(4) and 180.2(3), section 181.9, subsections 183.2(2), 185(3), and 187(3), section 187.6, and subsections 190.2(4), 191.4(2), 193(8), 194(8), 196(4), 202(3), 204.3(2), 204.8(3), 204.9(3), 207(3), 207.4(2), 207.7(4), 209(5), 227(10), and 227(10.1).

[8] Section 169 and subsection 172(2).

[9] An Act To Amend the Tax Court of Canada Act and Other Acts in Consequence Thereof, RSC 1985, c. 51 (4th supp.), section 6, proclaimed in force effective January 1, 1991 by orders in council PC 1990-2122 and PC 1990-2123. For a discussion of the origins and history of the Tax Court of Canada, see Robert McMechan and Gordon Bourgard, *Tax Court Practice 1995* (Scarborough, Ont.: Carswell, 1995), 1-25.

[10] Tax Court of Canada Act, RSC 1985, c. T-2, as amended, sections 17 to 17.8 (General Procedure), and sections 18 to 18.33 (Informal Procedure).

- federal income tax and penalties are $12,000.00 or less,[11]
- the amount of the loss determined by subsection 152(1.1) of the Income Tax Act is $24,000.00 or less,[12] or
- the only matter in issue is interest.[13]

Section 17 of the Tax Court of Canada Act provides that the general procedure applies in all other cases. No special form of pleading is required to initiate appeals under the informal procedure.[14] Appellants may appear personally or by agent,[15] and at the hearing the court is not bound by any legal or technical rules of evidence.[16] In contrast, appeals under the general procedure are commenced by an originating document of specified form and content.[17] The proceedings are subject to the rules of evidence and the usual procedures of civil litigation governing actions before the Federal Court—Trial Division and provincial courts of superior jurisdiction.[18] Under either the informal or the general procedure, the use that can be made of taxpayer information is governed by the strictures and exemptions in section 241 of the Income Tax Act.[19]

PURPOSE AND HISTORY OF THE CONFIDENTIALITY REQUIREMENT

In the absence of conduct or a specific undertaking giving rise to a duty of confidence on the part of the minister of national revenue,[20] information or documents obtained by or on behalf of the minister for the purposes

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[11] Ibid., sections 18(1)(a), 18.11(2) and (3), and 18.1, 18.12, and 18.13 as amended by SOR/93-295 (1993), vol. 127, no. 13 *Canada Gazette Part II*, section 3, in respect of appeals instituted on or after September 1, 1993. Before this date, the maximum amount referred to in the foregoing provisions was $7,000.00.

[12] Ibid., sections 18(1)(b), 18.1, 18.12, and 18.13 as amended by SOR/93-295, supra footnote 11, at section 4, in respect of appeals instituted on or after September 1, 1993. Before this date, the maximum amount referred to in the foregoing provisions was $14,000.00.

[13] Ibid., section 18(2).

[14] Tax Court of Canada Rules (Informal Procedure), SOR/90-688 (1990), vol. 124, no. 22 *Canada Gazette Part II*, section 4(1), quoting section 18.15(1) of the Tax Court of Canada Act, supra footnote 10.

[15] Section 18.14 of the Tax Court of Canada Act, supra footnote 10. The same right to appear personally is provided for in subsection 17.1(1) of that Act, although "where the party wishes to be represented by counsel, only a [lawyer] shall represent the party."

[16] Ibid., at section 18.15(4).

[17] Ibid., at section 17.2.

[18] McMechan and Bourgard, supra footnote 9, at 22.

[19] Section 295 of the Excise Tax Act, RSC 1985, c. E-15, as amended, provides an analogous set of strictures and exemptions to those contained in section 241 in respect of information obtained for the purposes of the goods and services tax.

[20] In *LAC Minerals Ltd. v. Int'l Corona Resources* (1989), 61 DLR (4th) 14, the Supreme Court of Canada confirmed that the test for establishing a breach of confidence consists in satisfying three conditions: that the information conveyed was confidential,

(The footnote is continued on the next page.)

of the Income Tax Act are treated as confidential only because Parliament requires it. As Rand J explained in *Regina v. Snider*:

> The disclosure of a person's return of income for taxation purposes is no more a matter of confidence or secrecy than that, say, of his real property which for generations have [sic] been publicly disclosed in assessment rolls. It is in the same category as any other fact in his life and the production in court of its details obtained from his books or any other source is an everyday occurrence. The ban against departmental disclosure is merely a concession to the inbred tendency to keep one's private affairs to one's self.[21]

However, since the *Snider* case, the notion of privacy and the role it plays in defining and governing relations between citizens and their government have significantly changed.

The enactment of the Privacy Act[22] and the Access to Information Act[23] established a general framework for the protection of personal information held or controlled by the federal government. The respective objectives of these two pieces of legislation, which came into force on July 7, 1982,[24] are to extend the laws of Canada

> that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to the information,[25]

and

> to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.[26]

Relative to the Privacy Act and the Access to Information Act, section 241 provides a specific scheme for the protection of information obtained by the minister of national revenue for the purposes of the Income Tax Act.[27] The policy underlying this protection has changed over time, from

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[20] Continued . . .
that it was communicated in confidence, and that it was misused by the party to whom it was communicated. The Federal Court of Appeal in *Crestbrook Forest Industries Limited v. The Queen*, infra footnote 110, applied the decision in the *LAC Minerals* case in concluding that a duty of confidence had arisen on the part of the minister of national revenue vis-à-vis information obtained in confidence from taxpayers for a specific purpose.

[21] [1954] CTC 255, at 260 (SCC).

[22] RSC 1985, c. P-21, as amended.

[23] RSC 1985, c. A-1, as amended.

[24] See SC 1980-81-82-83, c. 111, schedules I and II.

[25] Privacy Act, supra footnote 22, section 2.

[26] Access to Information Act, supra footnote 23, section 2.

[27] According to Priscilla Platt, "[a]ccess and privacy statutes generally prevail over non-disclosure provisions in other statutes unless specifically indicated otherwise": "The
(The footnote is continued on the next page.)

a concession to the propensity of taxpayers to keep information about their personal and financial affairs private, to a recognition that both taxpayers and the minister of national revenue have an interest in maintaining the confidentiality of information respectively given and obtained for the purposes of the Income Tax Act. The latter basis for section 241 was briefly discussed in the 1966 *Report of the Royal Commission on Taxation*,[28] where the justification given for keeping secret information furnished by an individual or corporate taxpayer to the tax authorities was that an "important element in tax compliance is a sense of assurance on the part of the taxpayer that his business or personal affairs will not become public property."[29] This position has since been affirmed and elaborated upon by the Supreme Court of Canada in *Slattery (Trustee of) v. Slattery*, as follows:

> [Section] 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4).
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> Section 241 reflects the importance of ensuring respect for a taxpayer's privacy interest, particularly as that interest relates to a taxpayer's finances. Therefore, access to financial and related information about taxpayers is to be taken seriously, and such information can only be disclosed in prescribed situations. Only in exceptional situations does the privacy interest give way to the interest of the state.
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> As alluded to already, Parliament recognized that to maintain the confidentiality of income tax returns and other obtained information is to encourage the voluntary tax reporting upon which our tax system is based. Taxpayers are responsible for reporting their income and expenses and for calculating the tax owed to Revenue Canada. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. The opposite is also true: If taxpayers lack this confidence,

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[27] Continued . . .
Impact of Access and Privacy Legislation on the Civil Litigation Process" (November 1994), 16 *The Advocates' Quarterly* 410-20, at 415. In that regard, the Privacy Act and the Access to Information Act both prohibit the disclosure of individuals' personal information in the custody or control of the federal government unless the disclosure is made in accordance with the exemptions specified in these enactments: Privacy Act, supra footnote 22, section 8; Access to Information Act, supra footnote 23, section 19. However, these exemptions are "subject to any other Act of Parliament" and, hence, subject to section 241 of the Income Tax Act. Moreover, under section 24(1) of the Access to Information Act, federal institutions are prohibited from disclosing information that may not be disclosed under other statutes listed in schedule II to this enactment. Since section 241 is one of the listed provisions, information that is prohibited from being disclosed under that provision cannot be disclosed under the Access to Information Act.

[28] Canada, *Report of the Royal Commission on Taxation* (Ottawa: Queen's Printer, 1966).

[29] Ibid., vol. 5, at 152.

> they may be reluctant to disclose voluntarily all of the required information. (Edwin C. Harris, *Canadian Income Taxation* (4th ed. 1986) at pp 26-27.)[30]

The evolution of the rationale for the confidentiality requirement that occurred between the decisions of the Supreme Court of Canada in the *Snider* and *Slattery* cases was accompanied by significant changes in its text. The present version of section 241 is the product of a number of amendments directed at correcting deficiencies brought to light through judicial interpretations of earlier versions of the provision, as well as updating it to deal with emerging issues in the area of privacy. In the *Slattery* case, Iacobucci J observed that "[l]egislated confidentiality of information obtained from taxpayers has moved through two distinct stages in Canada."[31] The first stage began with the enactment of the Income War Tax Act, 1917, section 11 of which reads as follows:

> No person employed in the service of His Majesty shall communicate or allow to be communicated to any person not legally entitled thereto, any information obtained under the provisions of this Act, or allow any such person to inspect or have access to any written statement furnished under the provisions of this Act. Any person violating any provisions of this section shall be liable on summary conviction to a penalty not exceeding two hundred dollars.[32]

Apart from minor amendments, the nature and scope of this provision remained unchanged for almost half a century.[33] According to Iacobucci J, this stage in the legislative history of the confidentiality requirement is characterized by two features: the prohibition against disclosure applied only to persons in the service of the Crown, and the exception to this statutory protection depended on the meaning ascribed to the phrase "a person, not legally entitled thereto."[34] The second legislative stage began with the changes wrought by two amendments in 1966 and 1967.[35] The

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[30] [1993] 3 SCR 430, at 443-44.

[31] Ibid., at 442.

[32] Income War Tax Act, 1917, SC 1917, c. 28.

[33] As Iacobucci J explained in *Slattery*, supra footnote 30, at 442, "Section 11 was re-enacted as s. 81 of the 1927 *Income War Tax Act*, R.S.C. 1927, c. 97, with the only modification being that the section was divided into two subsections, with the penalty option becoming s. 81(2). In 1948, s. 81 became s. 121 of *The Income Tax Act*, slight changes in wording took place, and the subsections reverted to a consolidated form once more (S.C. 1948, c. 52). In 1952, the last change of the first stage occurred, and s. 121 became s. 133."

[34] Ibid. McLachlin J in her dissenting opinion expressed the view, at 457, that the phrase "not legally entitled thereto" did not constitute a serious hurdle to disclosure. In that regard, McLachlin J quoted with approval the comment of Stephen J. Toope and Alison L. Young in "The Confidentiality of Tax Returns Under Canadian Law" (1982), vol. 27, no. 3 *McGill Law Journal* 479-503, at 487, that the confidentiality provision in force during this period created "*carte blanche* for the Minister to consider almost anyone to be 'legally entitled' to the information as long as they could show some vague need."

[35] *Slattery*, supra footnote 30, at 443, citing SC 1966-67, c. 47, section 17 and SC 1966-67, c. 91, section 22. For a discussion of these amendments and their effect on confidentiality under the Income Tax Act, see Toope and Young, supra footnote 34, at 488-91.

1966 amendment transformed section 133 into a format characteristic of today's confidentiality requirement. That is, it set out

- a prohibition against disclosing taxpayer information;[36]
- a restriction on the compellability of officials and authorized persons to testify in legal proceedings;[37]
- an exemption from the foregoing limitations in respect of criminal proceedings and proceedings relating to the administration or enforcement of the Income Tax Act;[38]
- a series of specific administrative exemptions from the confidentiality requirement;[39]
- an entitlement on the part of a taxpayer or his representative to be given access to information in documents provided by him to the minister of national revenue;[40] and
- a definition of who is an official or authorized person.[41]

The 1967 amendment to section 133 made provision for the minister of national revenue, an official, or an authorized person to appeal from an order or direction requiring the giving of evidence.[42] In 1972, section 133 was re-enacted as section 241[43] and since then has undergone a number of further changes.[44]

NATURE AND SCOPE OF THE CONFIDENTIALITY REQUIREMENT

The confidentiality requirement imposes a blanket prohibition against the disclosure of taxpayer information to any person and restricts the use that can be made of such information by an official, namely, for purposes related to the administration and enforcement of specified federal enactments. The prohibition and related restrictions are set out in subsection 241(1):

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[36] Subsection 133(1) of the Income Tax Act, RSC 1952, as amended by SC 1966-67, c. 47, section 17 and SC 1966-67, c. 91, section 22.

[37] Ibid., subsection 133(2).

[38] Ibid., subsection 133(3).

[39] Ibid., subsection 133(4).

[40] Ibid., subsection 133(5).

[41] Ibid., subsection 133(6).

[42] Ibid., subsection 133(7).

[43] SC 1970-71-72, c. 63, section 1.

[44] The most recent amendments to section 241 are set out in SC 1993, c. 24, section 137; SC 1994, c. 7, schedule II (SC 1991, c. 49), sections 190(1) and (2), schedule VI (SC 1993, c. 24), section 16, and schedule VIII (SC 1993, c. 24), sections 137(1), (2), and (3); SC 1994, c. 38, section 26(1); SC 1994, c. 41, section 38(1); and SC 1995, c. 3, sections 51(1) and (2).

> Except as authorized by this section, no official shall
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> (a) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;
>
> (b) knowingly allow any person to have access to any taxpayer information; or
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> (c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan* or the *Unemployment Insurance Act* or for the purpose for which it was provided under this section.

Subsection 241(10) defines who constitutes an official and what is encompassed by the notion of taxpayer information:

> "[O]fficial" means any person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of,
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> (a) Her Majesty in right of Canada or a province, or
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> (b) an authority engaged in administering a law of a province similar to the *Pension Benefits Standards Act, 1985*,
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> or any person who was formerly so employed, who formerly occupied such a position or who was formerly so engaged;
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> "taxpayer information" means information of any kind and in any form relating to one or more taxpayers that is
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> (a) obtained by or on behalf of the Minister for the purpose of this Act, or
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> (b) prepared from information referred to in paragraph (a),
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> but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.

A person previously or currently engaged to exercise a governmental responsibility by the federal or a provincial government constitutes an official and is subject to the requirements of section 241.[45] As well, information obtained by or on behalf of the minister of national revenue constitutes taxpayer information if, first, it relates to a taxpayer; second, it was obtained for the purposes of the Income Tax Act; and third, it directly or indirectly reveals the identity of the taxpayer to whom it relates. An understanding of the concept of taxpayer information is central to the determination of the purpose and scope of the confidentiality requirement.

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[45] While earlier versions of subsection 241(1) also referred to an authorized person, this reference was dropped in the 1993 amendments. It was retained, however, in subsection 241(6), which provides for an appeal from an order or direction made in the course of or in connection with any legal proceeding that requires the minister of national revenue, or an official or authorized person, to give or produce evidence relating to taxpayer information. Subsection 241(10) defines "authorized person" as "a person who is engaged or employed, or was formerly engaged or employed by or on behalf of Her Majesty in right of Canada to assist in carrying out the provisions of this Act, the *Canada Pension Plan* or the *Unemployment Insurance Act*."

Meaning of Taxpayer Information

The outcome in *The Queen v. Diversified Holdings Limited*[46] turned on whether the information in issue was obtained by or on behalf of the minister of national revenue. The plaintiff claimed damages against the Crown in right of Canada on the grounds that Revenue Canada had wrongfully caused officers of the sheriff's department in Victoria, British Columbia to seize and remove various items from premises on which the plaintiff held a mortgage. The seizure was conducted pursuant to a certificate issued by Revenue Canada against the mortgagor. As part of its disclosure under former rule 448 of the Federal Court Rules,[47] the Crown in right of Canada filed a supplementary list of documents that included information for which privilege was claimed under subsection 241(1), namely, docket notations made by collection officers in respect of a claim by Revenue Canada against the mortgagor of the premises. A motion was brought for an order compelling the production of the documents containing these notations. The application was granted on the ground that the documents had not been gathered by the minister of national revenue "in the course of general income tax information, procedures, investigations and matters of that kind," but rather came into existence as a result of collection proceedings started against the mortgagor and were therefore not "given to the Minister for the purposes of the *Income Tax Act*."[48]

The Federal Court of Appeal upheld the decision of the motions judge.[49] However, it did so without considering whether the documents were obtained for the purposes of the Income Tax Act, deciding the question instead on the narrower basis that the documents were not obtained by or on behalf of the minister of national revenue. As Décary JA explained:

> In the instant case the documents are part of a process, the collection proceedings, which is in itself in the public domain and which involves by its very nature the publication of information that would otherwise have remained confidential. One cannot seize a property pursuant to a certificate which has the force and effect of a judgment (see subsection 223(2) of the Act) without revealing to some extent information given to the Minister. Furthermore, the documents only relate, to the use the words of Collier J., "to the actions taken by and on behalf of Revenue Canada which give rise to the present litigation against, for practical purposes, Revenue Canada itself."
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> Section 241 was not enacted for the purpose of helping the Minister out of a negligence claim that has been brought against him. . . .
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> In view of the conclusion I have reached that the documents in question were not "obtained by or on behalf of the Minister," I need not decide whether they were obtained "for the purposes of the *Income Tax Act*."[50]

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[46] 91 DTC 5029 (FCA).

[47] Rule 448 was amended on December 6, 1990 by Amending Order no. 13 to the General Rules and Orders of the Federal Court of Canada, SOR/90-846 (1990), vol. 124, no. 6 *Canada Gazette Part II* 5496-5521.

[48] *Diversified Holdings Ltd. v. The Queen*, 89 DTC 5294, at 5295 (FCTD).

[49] Supra footnote 46.

[50] Ibid., at 5031-32.

Décary JA also stated that subsection 241(1) as it then read established a privilege in favour of persons who give documents or information to the minister of national revenue for the purposes of the Income Tax Act.[51] However, the definition of taxpayer information in the present version of section 241 makes it clear that the question whether information falls within the strictures of subsection 241(1) is determined with reference to the person to whom it relates.[52] This raises the possibility that the person from whom information is obtained and the one to whom it relates may not always be the same.

The words "relating to" have a similar if not identical meaning to the words "in respect of," and the latter have been described as words of the widest possible scope.[53] For the purposes of defining taxpayer information, and in the context of the Income Tax Act and the system of self-assessment that it establishes, the connection intended to be conveyed by the phrase "relating to" is between taxpayers and information about them that is obtained for purposes of calculating their income. Divisions A, B, C, and E of part I of the Income Tax Act respectively set forth the bases for tax liability and the rules for computing income, taxable income, and tax with reference to income earned from various sources.[54] The Act imposes an obligation on taxpayers to disclose annually to the minister of national revenue such of their financial affairs as are necessary to determine whether they have taxable income and, if so, the amount from each source and an estimate of tax payable.[55] On the basis of this disclosure, the minister is required to examine a taxpayer's return of income for a year and to assess tax, interest, and penalties, if any, payable with all due dispatch.[56] The minister is given a great deal of latitude in the way he carries out this function:

> There is no standard in the Act or elsewhere, either express or implied, for fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the Minister must do to make a proper assessment. It is exclusively for him to decide how he should, in any given case,

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[51] Ibid., at 5031.

[52] SC 1993, c. 24, section 137.

[53] As Dickson CJ explained in *Nowegjick v. The Queen et al.*, 83 DTC 5041, at 5045 (SCC), "[The words 'in respect of'] import such meaning as 'in relation to,' 'with reference to' or 'in connection with.' The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related matters."

[54] Computation of tax is based on taxable income, which is defined in subsection 2(2) of division A of the Income Tax Act to be a taxpayer's income for the year from various sources described in sections 3 and 4 of division B of the Act, plus the additions and minus the deductions respectively required and permitted by division C of the Act. Division E of the Act sets out the method for calculating tax payable in respect of taxable income for the year.

[55] Sections 150 and 151.

[56] Section 152.

> ascertain and fix the liability of the taxpayer. The extent of the investigation that he should make, if any, is for him to decide. Of necessity it will not be the same in all cases.[57]

The minister has the option of either accepting a taxpayer's income tax return as a correct statement of his or her taxable income or conducting further investigations to fix the taxpayer's tax liability.[58] If a taxpayer neither satisfies the reporting requirements of the Act nor complies with a request for further information, the minister is empowered to search for and obtain such additional information as may be relevant to an assessment of tax[59] and to impose civil and criminal penalties upon taxpayers who fail to fully disclose their taxable income.[60] Since most taxpayers comply with the reporting requirements of the Income Tax Act, information relating to them is usually obtained from their returns of income. This information will relate to other taxpayers if it is also used to calculate their income. It is arguable, however, that information obtained from one person for the sole purpose of calculating someone else's income will relate solely to the latter person.

Information obtained by the minister for the purposes of the Act constitutes taxpayer information only if it directly or indirectly identifies the taxpayer to whom it relates. Whether the information identifies a taxpayer depends on the person to whom it is disclosed and his or her knowledge of the taxpayer's personal and financial circumstances. Since an official can hardly be expected to know the degree to which a person is familiar with another taxpayer's personal or financial affairs, or to foresee all the ways in which a recipient of taxpayer information may use such information, or all the persons to whom it may subsequently be revealed, the closing words of the definition of taxpayer information should be interpreted as excluding only aggregates of tax data in the form of statistics generated from a sufficiently large sample.[61]

Privilege and Compellability

In the context of a legal proceeding, the prohibition against disclosing taxpayer information translates into privilege that inures to the benefit of the taxpayer. Simply stated, privilege constitutes a right "to refuse to

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[57] Thorson P in *Provincial Paper, Limited v. MNR*, 54 DTC 1199, at 1201 (Ex. Ct.).

[58] In *Smerchanski v. MNR*, 74 DTC 6197, at 6203 (FCA), Thurlow J noted that the minister of national revenue performs his assessing duty "on the basis of such relevant information as he has with respect to the subject's income, whether such information is provided by the subject in discharge of the obligation which the statute casts on him to provide information or is obtained by other means."

[59] Sections 231.1, 231.2, 231.3, and 231.4.

[60] Sections 238 and 239.

[61] See also paragraph 241(4)(g), which provides, "An official may . . . use taxpayer information to compile information in a form that does not directly or indirectly reveal the identity of the taxpayer to whom the information relates."

disclose evidence which otherwise would have to be disclosed."[62] This right remains extant whether the taxpayer information to which it relates was relied on by the minister of national revenue to issue a notice of assessment,[63] a determination of losses,[64] or a notification that no tax is owing.[65] In creating this privilege, section 241 also trenches on one of the principal tenets of the law of evidence, namely, that "subject to certain specified exceptions, every person is required to testify as to all facts inquired of in a court of justice upon which he may be knowledgeable, and which are not excluded by an 'exclusionary' rule, such as hearsay."[66] This limitation is set out in subsection 241(2):

> Notwithstanding any other Act of Parliament or other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any taxpayer information.

In other words, but for subsection 241(2), officials could be compelled to give evidence in all legal proceedings. The prohibition of subsection 241(2) is buttressed by subsections 241(6), (7), and (8), which give officials and authorized persons the right to appeal from "an order or direction made in the course of or in connection with any legal proceeding" requiring an official or authorized person to disclose information or documents obtained for the purposes of the Income Tax Act and to stay the proceedings in which the order is made.

EXEMPTIONS FROM THE CONFIDENTIALITY REQUIREMENT

Generally speaking, section 241 provides two categories of exemptions from the confidentiality requirement. The first category allows officials to disclose and use taxpayer information to administer and enforce the Income Tax Act, the Canada Pension Plan,[67] and the Unemployment Insurance Act,[68] as well as for purposes related to various other governmental activities. The second category permits the disclosure of taxpayer information in criminal proceedings and in administrative and enforcement

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[62] Beverly McLachlin, "Confidential Communications and the Law of Privilege" (1977), vol. 11, no. 2 *University of British Columbia Law Review* 266-84, at 266: "The concept of privilege . . . is concerned with what a witness who has been properly sworn may decline to disclose. It is concerned with objections of a witness to provide answers to certain questions, not on the ground that the evidence is irrelevant or unreliable but on the ground that it involves subject matter that is protected from the scrutiny of the court."

[63] Section 152.

[64] Subsection 152(1.1).

[65] Such notification is commonly referred to as a nil assessment. A nil assessment cannot be appealed to the Tax Court of Canada under section 169 of the Income Tax Act: *The Queen v. The Consumers' Gas Company Limited*, 87 DTC 5008 (FCA).

[66] McLachlin, supra footnote 62, at 266.

[67] RSC 1985, c. C-8, as amended.

[68] RSC 1985, c. U-1, as amended.

proceedings under the foregoing enactments and any other federal statute that imposes taxes.

Exemptions Related to the Administration and Enforcement of the Income Tax Act

Exemptions relating to the administration and enforcement of the Income Tax Act are principally found in subsection 241(4). Paragraphs 241(4)(a) and (b) respectively provide that an official may provide to any person taxpayer information that can reasonably be regarded as necessary for the sole purpose of administering or enforcing the Income Tax Act, the Canada Pension Plan, or the Unemployment Insurance Act and for "determining any tax, interest, penalty or other amount that is or may become payable by the person, or any refund or tax credit to which the person is or may become entitled, under this Act or any other amount that is relevant for the purposes of that determination."[69] Paragraphs 241(4)(d), (e), (f), (g), and (i) allow an official to provide taxpayer information to officials or other departments of the federal government or officials of provincial governments for specified purposes, including

- policy formulation and evaluation,[70]
- the administration or enforcement of specified federal or provincial legislation and programs,[71]
- the conduct of statistical research and analysis,[72]
- a setoff of debts between federal and provincial Crowns in respect of debts owing on account of taxes,[73] and
- the issuance of remission orders and the writing off of debts pursuant to sections 23 to 25 of the Financial Administration Act.[74]

Paragraph 241(4)(h) permits an official to use, or to provide to any person, taxpayer information solely for a purpose relating to the supervision, evaluation, or discipline of an authorized individual engaged or employed by the federal government to assist in the administration or enforcement of the Income Tax Act, the Canada Pension Plan, or the Unemployment Insurance Act. The scope of this exemption is limited by

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[69] The expression "this Act" in subsection 241(4) refers to the Income Tax Act and the Petroleum and Gas Revenue Tax Act. See subsection 241(11), infra footnote 86. For a discussion of the history of paragraph 241(4)(b) and the duty of the minister of national revenue under that provision, see William Innes and Janice McCart, "Transfer-Pricing Disputes: Access to and Disclosure of Information" (1995), vol. 43, no. 4 *Canadian Tax Journal* 821-68, at 825-28 and 837-40.

[70] Subparagraphs 241(4)(d)(i), (iv), and (x).

[71] Subparagraphs 241(4)(d)(ii), (iii), (v), (vi), (vi.1), (vii), (viii), (x), (xi), (xii), and (xiv), and paragraphs 241(4)(e) and (i).

[72] Subparagraphs 241(4)(d)(ix) and 241(4)(e)(x), and paragraph 241(4)(g).

[73] Subparagraph 241(4)(d)(xiii).

[74] Paragraph 241(4)(f).

subsection 241(4.1), which prescribes measures to prevent unauthorized use or disclosure of taxpayer information in the course of such proceedings. Paragraph 241(4)(k) harbours the last vestige of what Iacobucci J referred to in the *Slattery* case as the first stage in the evolution of the confidentiality requirement. The provision permits an official to "provide, or allow inspection of or access to, taxpayer information to or by any person otherwise legally entitled to it under an Act of Parliament solely for the purposes for which that person is entitled to the information." However, as McLachlin J observed in the *Slattery* case, such form of disclosure is no longer the animating concern of the section and must now be understood as "one element in a group of narrow and particular exemptions largely administrative in nature."[75]

Mention should also be made of subsections 241(3.1) and 241(5). Subsection 241(3.1) permits the minister of national revenue to provide to appropriate persons any taxpayer information relating to imminent danger or death or physical injury to any individual. It is the only provision that allows taxpayer information to be released to a person who is neither an official nor someone to whom such information relates, for purposes unrelated to the administration or enforcement of the Income Tax Act or other federal enactments. Subsection 241(5) meets an obvious need by permitting an official to provide taxpayer information relating to a taxpayer to that taxpayer and, with the consent of the taxpayer, to any other person.[76]

Exemptions Related to Criminal Proceedings and Proceedings for the Administration and Enforcement of the Income Tax Act

Subsection 241(3) provides a total exemption in respect of specified legal proceedings from the privilege that arises from subsection 241(1) as well as from the limitations contained in subsection 241(2) on the compellability of officials to attend and testify at such proceedings. The exemption reads as follows:

> Subsections (1) and (2) do not apply in respect of
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> (a) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or
>
> b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan* or the *Unemployment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

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[75] *Slattery*, supra footnote 30, at 458. For a more detailed discussion of the exemptions in subsection 241(4), see *Canada Tax Service* (Scarborough, Ont.: Carswell) (looseleaf), 241-117 to 241-124.

[76] See also paragraph 241(4)(j), which provides that an official may "use taxpayer information relating to a taxpayer to provide information to the taxpayer."

History and Nature of the Exemptions

A useful starting point for considering the concerns and events that shaped the text and interpretation of subsection 241(3) is the decision of the Supreme Court of Canada in the *Snider* case.[77] The court in *Snider* examined the confidentiality requirement in force before its amendment in 1966 and 1967. The issue in the case was whether the minister of national revenue could refuse to disclose tax information at a criminal trial by invoking section 121 of the Income Tax Act,[78] which prohibited the disclosure of any information obtained under the Act to any person "not legally entitled thereto." The majority of the court found that the secrecy contemplated by the Income Tax Act, and by section 121 in particular, was for the benefit of the taxpayer only and that the question whether the minister of national revenue had the right to object before a court to the production of the income returns of a person charged in criminal proceedings would be decided on the basis of the general law of Canada. The latter issue was found to turn on the further question whether, on the basis of special facts set forth in an affidavit of the minister of national revenue, the public interest would be prejudiced in the disclosure.[79] However, as previously noted, section 121 was re-enacted in 1952 as section 133[80] and then replaced in 1966 with a provision that in substance and form resembles the confidentiality provision in force today.[81]

As a result of the 1966 amendment, the first three subsections of section 133 read as follows:

> (1) Except as authorized by this section, no official or authorized person shall
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> (a) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act, or
>
> (b) knowingly allow any person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.
>
> (2) Notwithstanding any other Act or law, no official or authorized person shall be required, in connection with any legal proceedings,
>
> (a) to give evidence relating to any information obtained by or on behalf of the Minister for the purposes of this Act, or
>
> (b) to produce any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.

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[77] Supra footnote 21.

[78] RSC 1948, c. 52.

[79] The requirements for such an affidavit are now set out in section 37 of the Canada Evidence Act, RSC 1985, c. C-5, as amended.

[80] See supra footnote 33.

[81] Supra footnotes 35 to 42 and the accompanying text.

> (3) Subsections (1) and (2) do not apply in respect of criminal proceedings, either by indictment or on summary conviction, under an Act of the Parliament of Canada, or in respect of proceedings relating to the administration or enforcement of this Act.

Whereas the exemption in section 121 depended on whether a person was legally entitled to information under the Income Tax Act, subsection 133(3) applied to specified proceedings, namely, criminal proceedings and proceedings relating to the administration or enforcement of the Act. The exemption in respect of criminal proceedings has since been twice amended. It was amended in 1987 to make it clear that a criminal proceeding, either by indictment or on summary conviction, begins with the laying of an information (a criminal charge).[82] This amendment appears to have been made in response to the decision of the Quebec Court of Appeal in *Attorney General of Canada v. Thibault*,[83] which required the minister of national revenue to comply with a search warrant authorizing police officers, as part of a criminal investigation, to seize documents in the possession of Revenue Canada that were filed by a taxpayer in compliance with the reporting requirements of the Income Tax Act, even though the search warrant was issued before an information had been laid. Subsection 241(3) was amended to read:

> Subsections (1) and (2) do not apply in respect of criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information, under an Act of the Parliament of Canada,

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[82] Canada, Department of Finance, *Technical Notes to a Notice of Ways and Means Motion Relating to Income Tax* (Ottawa: the department, June 3, 1987), subclause 68(2): "Subsection 241(3) of the Act authorizes the disclosure of tax information in criminal proceedings. This exception to the general rule of confidentiality of tax information was intended to apply only after criminal charges had been laid. A recent court case, however, indicates that police forces and prosecutors may be able to demand information as soon as a criminal investigation has begun. The amendment to subsection 241(3) of the Act will clarify that tax information may be provided by Revenue Canada in criminal proceedings only following the laying of a criminal charge."

[83] 87 DTC 5085 (Que. CA). Provision was subsequently made for the minister of national revenue to release taxpayer information to police officers in compliance with a search warrant issued under section 462.48(3) of the Criminal Code. Under subparagraph 241(4)(e)(v) (formerly paragraph 241(4)(i), added by SC 1988, c. 51, section 14, applicable from January 1, 1989), an official may provide taxpayer information, or allow the inspection of or access to taxpayer information, "under, and solely for the purposes of," an order under section 462.48(3) specified in section 462.48(1) to be

> for the purposes of an investigation in relation to
>
> (a) a designated drug offence, or
>
> (b) an offence against section 354 or 462.31 where the offence is alleged to have been committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of
>
> (i) the commission in Canada of a designated drug offence, or
>
> (ii) an act or omission anywhere that, if it had occurred in Canada, would have constituted a drug offence.

The laying of an information does not constitute a precondition to applying for, obtaining, and complying with a search warrant issued under section 462.48(3).

> or in respect of proceedings relating to the administration or enforcement of this Act or the *Petroleum and Gas Revenue Tax Act*.[84]

Subsection 241(3) was also amended in 1993 to reflect the difference between the document by which a criminal proceeding on summary conviction is commenced, namely, an information, and an indictment that is preferred or lodged with the court at the opening of the accused's trial.[85]

As regards non-criminal proceedings, the exemption in subsection 133(3) was initially limited to proceedings that related to the administration or enforcement of the Income Tax Act. In 1981, Parliament extended the exemption to include proceedings under the Petroleum and Gas Revenue Tax Act[86] and then further amended it in 1993 to include proceedings under the Canada Pension Plan, the Unemployment Insurance Act, and "any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty."[87] Neither the Tax Court of Canada Act, nor the regulations to that Act, nor the Income Tax Act defines what constitutes a proceeding relating to the administration or enforcement of the Income Tax Act. However, it seems clear—on the basis of the right to appeal from assessments of tax set out in division J of part I of the Income Tax Act,[88] the nature of these appeals,[89] and the broad scope normally attributed to the notion of a proceeding[90]—that such a

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[84] SC 1987, c. 46, section 68(2).

[85] SC 1993, c. 24, section 137(1). For a discussion of how and when an indictment is preferred, see *R v. Chabot*, [1980] 2 SCR 985.

[86] SC 1980-81-82-83, c. 68, section 117. Subsection 241(11) now provides, "The references in subsections (1), (3), (4) and (10) to 'this Act' shall be read as references to 'this Act or the *Petroleum and Gas Revenue Tax Act*.' "

[87] SC 1993, c. 24, section 137, re-enacted as SC 1994, c. 7, schedule VIII. Disputes relating to assessments under provincial legislation are dealt with in accordance with the procedure, and before the courts, prescribed by these statutes. The Tax Court of Canada is without jurisdiction in respect of such assessments: *Lemaire Estate v. MNR*, 94 DTC 1925 (TCC).

[88] Supra footnote 8.

[89] Section 171 of the Income Tax Act provides:

> The Tax Court of Canada may dispose of an appeal by
>
> (a) dismissing it; or
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> (b) allowing it and
>
> (i) vacating the assessment,
>
> (ii) varying the assessment, or
>
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

In exercising its powers under section 171, the Tax Court of Canada has jurisdiction to decide all issues that are necessary and ancillary to reaching its decision: *Stewart v. MNR*, 90 DTC 1110, at 1112-13 (TCC).

[90] For example, see *Hughes v. O'Sullivan* (1986), 12 CPC (2d) 62, at 66 (BC CA), per Toy J: "the word 'proceeding' refers to the whole event, from the commencement of action

(The footnote is continued on the next page.)

proceeding encompasses appeals before the Tax Court of Canada and the Federal Court—Trial Division pursuant to sections 169 and 172 of the Act, respectively, as well as references under section 174.[91] On the other hand, recent case law has established that taxpayers have an option regarding the forum and procedure by which they can challenge the Crown's entitlement to impose tax, at least where the challenge is not directed at the validity of an assessment. Accordingly, it is possible that actions that are not appeals under the Income Tax Act can also constitute administrative and enforcement proceedings within the meaning of subsection 241(3).

In *The Queen v. Erasmus et al.*,[92] six taxpayers employed by the Dene Nations, acting on behalf of themselves and other members of Indian Bands, filed a statement of claim in the Trial Division of the Federal Court in which they claimed various forms of declaratory relief predicated on the plaintiffs' alleged tax-exempt status under the Indian Act, the Territorial Lands Act, and Treaty nos. 8 and 11. The Crown moved to strike the statement of claim on the ground that, since the income tax liability for the plaintiffs was determined by assessments pursuant to section 152 of the Income Tax Act and was not attacked under the appeal procedure of the Act, the court lacked jurisdiction to entertain the action by virtue of section 29 of the Federal Court Act.[93] The motions judge dismissed the application, holding instead that the court did not lack jurisdiction to hear the matter.

In dismissing the appeal taken from this decision, the Federal Court of Appeal distinguished between an action to set aside or vary income tax assessments, which is the object of an appeal under section 169 of the Income Tax Act, and an action for a declaration that certain kinds of income are exempt from tax. According to the court, section 29 of the Federal Court Act ousts the jurisdiction of the Federal Court only in respect of the former action. As Pratte JA explained in response to the

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[90] Continued . . .
by the issuance of a writ to the conclusion of the trial, no matter how many causes of action are raised by way of pleadings in either the statement of claim or in the counterclaim." See also *Mark v. Canada (Minister of Fisheries and Oceans)* (1991), 50 FTR 157, at 158-59 (FCTD), per Cullen J, considering the use of the word "proceedings" in section 50(1)(b) of the Federal Court Act, RSC 1985, c. F-7: "the most compelling definitions are contained in the *Shorter Oxford English Dictionary*, vol. II (3rd Ed.) Oxford University Press (1973): 'The instituting or carrying on of an action at law; a legal action or process, any act done by authority of a court of law; any step taken in a cause by either party.'"

[91] See supra footnote 7. Section 2 of the Tax Court Rules (General Procedure), SOR/92-41 (1992), vol. 126, no. 1 *Canada Gazette Part II*, provides that a proceeding in these rules means an appeal or reference. While the rules governing appeals under the informal procedure do not contain a similar definition, the omission likely reflects the summary nature of these rules. Such appeals are clearly proceedings under the Tax Court Rules (Informal Procedure).

[92] 92 DTC 6301 (FCA), aff'g. 91 DTC 5415 (FCTD).

[93] RSC 1985, c. F-7. Section 29 has since been replaced by section 18.5, which was added by SC 1990, c. 8, section 5.

Crown's argument that tax disputes can be litigated only pursuant to the procedure provided for under the Income Tax Act:

> This reasoning would be compelling if the plaintiffs were seeking by their action to set aside or vary income tax assessments. But that is not what they claim. They merely pray for a declaration that certain kinds of income be declared to be exempt from tax and that the tax they paid on that income be refunded. As they are not attacking any assessments, section 29 has no application here.
>
> This does not mean that the plaintiffs' action could succeed for the taxation years where their income tax liability has been determined by an assessment. Obviously, it could not. The reason for this, however, is not that the Court has no jurisdiction to grant the relief sought for those years, but rather, that, in those years, the plaintiffs are not entitled to that relief since under subsection 152(8) of the *Income Tax Act*, an income tax assessment is defined to be valid and binding as long as it has not been vacated or varied under the provisions of that Act.
>
> It follows that, contrary to what was argued by the appellant, the affidavit filed in support of the motion does not show that section 29 ousts the Trial Division of its jurisdiction with respect to the years where the plaintiffs' tax liability was confirmed by an assessment; it merely shows that, for those years, the plaintiffs have no reasonable cause of action, a purpose for which the affidavit cannot be used.
>
> The appellant also argued that, in any event, the jurisdiction of the Court to entertain the plaintiffs' action is impliedly taken away by the *Income Tax Act* which provides for a scheme for tracking income tax assessments and for recovering taxes unduly paid. I do not agree. I do not see anything in that Act which limits the jurisdiction of the Trial Division, in an appropriate case, to issue a declaration of certain revenues or to order the repayment of taxes that the Minister unduly retains.[94]

The decision in the *Erasmus* case was followed by Jerome ACJ in *Benoit et al. v. MNR*.[95] The plaintiffs, who are Indians within the meaning of the Indian Act, sought a declaration that, first, they were entitled to the benefits of Treaty no. 8; second, the provisions of this treaty conferred upon them the right to tax-exempt status; and third, the imposition of any tax by the Crown is an unjustified breach of the treaty. The Crown again moved to strike the statement of claim on the grounds, inter alia, that an assessment of tax is subject to challenge pursuant to the provisions of the Income Tax Act and the Excise Tax Act,[96] and consequently, pursuant to section 18.5 of the Federal Court Act, an appeal from an assessment of

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[94] Supra footnote 92, at 6304 (FCA). It otherwise remains settled law that assessments can be challenged only under the appeal procedure set out in the Income Tax Act: *MNR v. Parsons*, 84 DTC 6345, at 6346 (FCA); *The Queen et al. v. Optical Recording Laboratories Inc.*, 90 DTC 6647, at 6652 (FCA); and *Ludmer et al. v. The Queen*, 95 DTC 5311 (FCA), aff'g. 94 DTC 222 (FCTD).

[95] (1994), 67 FTR 217 (FCTD).

[96] Supra footnote 19.

tax may be challenged only under the applicable provisions of those taxation statutes. The motions judge dismissed the application, holding that the arguments tendered in support of its position had already been considered and rejected in the *Erasmus* case.

While neither the *Erasmus* nor the *Benoit* case constitutes an appeal under the Income Tax Act, these decisions clearly affect the ability of the minister of national revenue to assess tax and therefore arguably constitute "administrative or enforcement proceedings" under the Act. The tenability of this view is supported by judicial consideration of this phrase in *Slattery*,[97] which appears to have extended the exemption to include steps and measures connected with other actions that are also not appeals or actions under the Act, but where the question in issue nonetheless concerns the collection of money owing to Revenue Canada or a person's liability to taxation.

In the *Slattery* case, the Supreme Court of Canada held that proceedings for the collection of unpaid taxes where neither the minister of national revenue nor the Crown is a party also can constitute proceedings that relate to the administration or enforcement of the Income Tax Act. In that case, the trustee of an estate who had been petitioned into bankruptcy by the minister of national revenue commenced an action to collect assets for the purpose of paying creditors. At trial, the New Brunswick Court of Queen's Bench admitted into evidence the testimony of Revenue Canada officials respecting information that they had obtained in the course of investigating the deceased bankrupt and the companies with which he was associated. On appeal from the decision to allow the trustee's claim, the deceased's wife argued that subsections 241(1) and (2) of the Income Tax Act prohibit the use of such information and that the evidence is not otherwise admissible under subsection 241(3) because the proceedings did not relate to the administration or enforcement of the Act. In dismissing the appeal, Hoyt JA, on behalf of the New Brunswick Court of Appeal, held that because the action undertaken by the trustee was commenced so that the bankrupt creditors, including Revenue Canada as a preferred creditor, could be paid, it constituted an enforcement proceeding under the Income Tax Act:

> In my opinion, this action is a proceeding relating to the enforcement, if not the administration of the *Income Tax Act*. A taxpayer who, like Mr. Slattery, circumvents tax collection procedures found in the Act is not thereby immune from other proceedings that the Minister may take to collect unpaid taxes and thus enforce the Act. Although Mr. Slattery is not a defendant in this proceeding, the trial judge has found, correctly in my view, that this situation arose because Mr. Slattery attempted to avoid paying outstanding taxes owed to Revenue Canada by implicating Mrs. Slattery with, it must be noted, her acquiescence. Although she might not have known the exact details of or the precise reasons for the scheme, Mrs. Slattery was aware that her role was as the trial judge said, "to execute

[97] Supra footnote 30.

> documents as requested." That this action calls into question the ownership of assets that appear to belong to a person other than the taxpayer does not alter the nature of the action, being an action for the enforcement of the *Income Tax Act* for the ultimate collection of unpaid taxes.[98]

The Supreme Court of Canada upheld the decision of the New Brunswick Court of Appeal. Iacobucci J stated:

> To answer [the question of what type of administration or enforcement proceedings are contemplated by subsection 241(3)], one must look first to the wording of s. 241(3). That provision contains no language which confines the concept of proceedings relating to administration or enforcement to the boundaries of the *Income Tax Act*. This conclusion is buttressed when one considers the context of s. 241.
>
> Section 241 is found in Part XV of the *Income Tax Act*, which deals with administration and enforcement as previously noted. It is obvious, but the fact should nonetheless be highlighted, that the collection of money owing to Revenue Canada is an important part of the Act's enforcement.[99]

In so concluding, Iacobucci J distinguished the court's earlier decision in *Glover v. MNR*,[100] in which it upheld the reversal by the Ontario Court of Appeal of an order issued by the Ontario Supreme Court directing Revenue Canada to disclose the address of the husband of a petitioner in a divorce action who had absconded with the children of the marriage. The minister of national revenue had successfully appealed the order on the basis that

> the prohibition in s. 241 of the *Income Tax Act* against requiring the communication of any information obtained by the Minister for the purpose of the *Income Tax Act* is an absolute one and that the Court, in the circumstances of the case, does not come within any of the listed exceptions to that prohibition.[101]

In considering the applicability of this conclusion, Iacobucci J stated that it did not inform the issue before him because the proceedings in the *Glover* case had no connection whatsoever with the administration or enforcement of the Income Tax Act.[102]

Scope and Effect of the Exemptions

Under either the general or the informal procedure, the applicability of subsection 241(3) to administrative or enforcement actions under the Income Tax Act varies according to whether a party is seeking to enter taxpayer information into evidence through the taxpayer, through persons who provided information about the taxpayer, or through an official or authorized person. Taxpayers remain free to disclose information about

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[98] (1991), 84 DLR (4th) 360, at 365 (NB CA).

[99] Supra footnote 30, at 446-47.

[100] [1981] 2 SCR 561.

[101] *Glover v. Glover (No. 1)* (1980), 29 OR (2d) 392, at 394 (CA).

[102] Supra footnote 30, at 449-50.

their financial affairs to whomever they please. Moreover, unlike officials whose compellability is circumscribed by subsection 241(2), taxpayers and anyone who provides information about them to the minister of national revenue can be compelled to give evidence in respect of such information in any civil or criminal action. The exemption in subsection 241(3) comes into play only when taxpayer information is sought to be elicited through an official. The scope and effect of this exemption were judicially considered in *In re Huron Steel Fabricators (London) Ltd. et al. v. MNR*[103] and *Bassermann*.[104]

In the *Huron Steel* case, the minister of national revenue based his assessment of the taxpayer on information obtained from another taxpayer's return of income. In the course of examinations for discovery, the appellant taxpayer sought to obtain this information, as well as the returns of income in which it was contained. Relying on section 41 of the Federal Court Act,[105] the minister refused to comply with both requests on the ground that the public interest in keeping such information and documents confidential outweighed the public interest in their disclosure. The appellant taxpayer applied for an order directing the minister to produce the requested information and documents. In allowing the application, Heald J stated:

> I might add, parenthetically, that in the present statute (*The Income Tax Act*, 1972), the only references to secrecy and confidentiality are contained in Section 179 (which gives the taxpayer . . . a right to request that the proceedings before the Tax Review Board and the Federal Court be held in camera) and Section 241 has no application to the situation here because subsection (3) thereof exempts the provisions of subsections (1) and (2) from income tax proceedings such as this. Subsections (1) and (2) are the provisions dealing with confidentiality.[106]

The Federal Court of Appeal upheld the decision to allow the application for production and commented as follows on the applicability and relevance of the confidentiality requirement under the Income Tax Act:

> The statutory provisions with respect to disclosure have undergone notable changes since the *Snider* case was decided but it appears to me to follow from the reasoning in that case that in this country there is no basis for a conclusion that the disclosures which the *Income Tax Act* requires the taxpayer to make are confidential and there is no immunity for them from production in legal proceedings except to the extent that Parliament has expressly spelled out such immunity in the statute.[107]

The decisions of the Federal Court—Trial Division and the Federal Court of Appeal follow from a plain and grammatical reading of subsection 241(3).

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[103] 72 DTC 6426 (FCTD).

[104] Supra footnote 2.

[105] Now section 37 of the Canada Evidence Act, supra footnote 79.

[106] Supra footnote 103, at 6429.

[107] 73 DTC 5347, at 5352 (FCA).

In the *Bassermann* case, a lawyer who was assessed unemployment insurance premiums, penalties, and interest in respect of persons engaged by him through a secretarial service, appealed from the reassessments to the Tax Court of Canada and applied for discovery. As a result of the application, an order issued from the Tax Court of Canada allowing the appellant to examine an officer of the Department of National Revenue under oath and requiring that officer, on behalf of the minister of national revenue,

> [to] make discovery on oath of all books, accounts, invoices, contracts, letters, statements, records, returns, bills, vouchers, and copies of the same, in the Respondent's possession or under its control relating to the matter within the scope of this proceeding.[108]

Pursuant to this order, the appellant demanded production of the personal income tax returns of five of the individuals supplied by the secretarial service. The minister first deferred complying with the order until he could obtain the consent of these individuals and then refused to produce the returns of the non-consenting individuals. In response, the appellant brought an application for judgment. The application was granted, and the minister appealed to the Federal Court of Appeal. In dismissing the appeal, Mahoney JA, on behalf of the court, concluded that a taxpayer whose information is the subject of disclosure is not entitled as a matter of right to assert his statutory privilege under subsection 241(1):

> The prohibition of s-s. (2) against disclosure of an income return "in connection with any legal proceeding" is subject to the exception of s-s. (3)(b) as to the proceedings relating to the administration or enforcement of, among others, the *Unemployment Insurance Act*. . . . The order made here can still be made without a taxpayer knowing that his or her return is required to be disclosed in its entirety to a business connection.[109]

In other words, the entitlement to disclose taxpayer information in the course of exempted proceedings is unfettered by requirements to notify affected taxpayers.

Notwithstanding the broad scope of subsection 241(3), it is inapplicable to claims of privilege that arise outside the context of subsections 241(1) and (2). As the case of *Crestbrook Forest Industries Limited v. The Queen*[110] illustrates, one way for this right to arise is through a specific undertaking of confidentiality. The dispute in the *Crestbrook* case centred on the reasonability of discounts on pulp sales to the taxpayer's customers. The minister of national revenue considered the discounts too high and obtained information and documents in the course of a survey to determine a reasonable range of arm's-length sales, discounts, and commissions applicable to wood pulp and newsprint export prices. It was made clear to those surveyed that the information they provided would be

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[108] Supra footnote 2, at 106.

[109] Ibid., at 107-8. See also *Hassanali Estate v. Canada*, [1996] FCJ no. 452 (FCA).

[110] 91 DTC 5521 (FCTD).

kept confidential. At examinations for discovery, the Crown witness admitted that the information obtained from the survey formed the basis of the reassessments in issue. However, disclosure of this information was objected to by Crown counsel, and the taxpayer brought a motion for production. Notice of the application was given to the companies surveyed, a number of which intervened to oppose the motion. The taxpayer's application was granted, subject to unspecified confidentiality conditions that were left to counsel to agree upon. In making this order, the presiding judge balanced the need of the taxpayer to prove his case with the need of interveners to protect the confidentiality of information they had voluntarily submitted.[111]

On appeal, the Federal Court of Appeal concurred with the approach of the presiding judge but disagreed with the conclusion reached. In setting aside his order and dismissing the application for production, Hugesson JA, on behalf of the court, held that the minister of national revenue could not rely on this information and was prohibited from producing it at either discovery or trial.[112] In so holding, Hugesson JA concluded that the impugned information could not advance the litigation and stated:

> The law favours the protection of information given and obtained in confidence and in good faith. See *Slavutych v. Baker et al.*, [[1976] 1 SCR 254]. The principle was most recently restated by the Supreme Court in *Lac Minerals v. International Corona Resources* [[1989] 2 SCR 574] where LaForest, J., speaking for the majority, said at p. 642:
>
> > In establishing a breach of a duty of confidence, the relevant question to be asked is, "what is the confidee entitled to do with the information?" and not, "to what use he is prohibited from putting it?" Any use other than a permitted use is prohibited and amounts to a breach of duty. When information is provided in confidence, the obligation is on the confidee to show that the use to which he put the information is not a prohibited use.
>
> In our view, where the Crown has obtained information in confidence from taxpayers on a voluntary basis and for a specified and defined purpose, it may not subsequently make use of that information for a different purpose, namely the reassessment of other taxpayers, in circumstances where such use will almost inevitably result in a breach of the Crown's undertaking of confidence.[113]

In other words, even where information is obtained for the purposes of the Income Tax Act, if it was voluntarily given on the promise (distinct from the requirement of confidentiality in subsection 241(1)) that it would be kept confidential, it then becomes subject to the protection accorded generally to confidences by the courts and consequently falls outside the scope of subsection 241(3). Although Hugesson JA does not refer to this

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[111] Ibid., at 5525.

[112] 92 DTC 6187, at 6188 (FCA).

[113] Ibid.

protection as privilege, that is what it amounts to in the result. The question this raises is, what is the basis for such privilege?

According to McLachlin, there are several types of privilege recognized by the law of evidence:

> The first is the privilege against self-incrimination founded on the common law, as altered by statute. The second category of privilege relates to matters affecting public interest, such as affairs of state, information obtained in the detection of crime, and Parliamentary proceedings. Again while founded on the common law, it has been altered by legislation. A third category of privilege extends limited protection to "without prejudice" statements made in the course of negotiations. Like the privilege against self-incrimination, it is founded on the common law. Finally, there is that category of privilege which is concerned with confidential communications made between people in the context of a special relationship.[114]

Only the last mentioned category—privilege for the protection of confidential relationships—is relevant in the circumstances of the *Crestbrook* case. The basis on which such privilege can be claimed was examined by Lamer CJC in *R v. Gruenke*:[115]

> The parties have tended to distinguish between two categories: a "blanket," *prima facie*, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should *not* be privileged (*i.e.*, why they should be admitted into evidence as an exception to the general rule). 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: see *Geffen v. Goodman Estate* (1991), 81 D.L.R. (4th) 211, 80 Alta. L.R. (2d) 293, 127 N.R. 241 (S.C.C.); *R. v. Solosky* (1979), 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, [1980] 1 S.C.R. 821. 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" . . . 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.[116]

Since communications between taxpayers and the minister of national revenue do not fit within the class of communications traditionally protected at common law, the *Crestbrook* case must be analyzed on the basis of a "case-by-case" privilege.

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[114] Supra footnote 62, at 266-67.

[115] (1991), 67 CCC (3d) 289 (SCC).

[116] Ibid., at 303.

The "Wigmore test," which underlies the case-by-case analysis, comprises the following four conditions:

> (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.[117]

It is arguable that, in the circumstances of the *Crestbrook* case, the first three conditions are satisfied: the communications between the minister and the companies surveyed in respect of discounts and commissions applicable to wood pulp and newsprint export prices originated in confidence; such confidence was essential to the conduct of this inquiry; and it is in the interest of the community that the relationship between those surveyed and the minister be fostered in these circumstances. If that is the case, Hugesson JA then needed only to address the last condition, which he arguably did when he weighed the public interest in favour of disclosure against the private interest in favour of confidentiality and held that the latter interest prevailed.[118] It is also arguable, however, that the absence of any discussion by Hugesson JA of the Wigmore test, coupled with the reliance he placed on the doctrine of breach of confidentiality, indicates that a duty of confidence alone was considered sufficient to found a claim of privilege. If that is the case, a question then arises as to the tenability of this view. As McLachlin explained:

> Logically, the use of the concept of breach of confidence as a basis for excluding confidential communications conflicts with the doctrine of privileged communications. The doctrine of breach of confidence requires only that it be established that the evidence was given on a confidential basis. On the other hand, the law relating to privileged communications has consistently been based on the view that confidentiality alone is an insufficient basis for the exclusion of evidence. On the traditional "category" approach to evidence, only those confidences made between particular specified persons, in certain specified circumstances, were held to be immune from disclosure. Similarly, on Wigmore's "principle" approach confidentiality is only one of four conditions which must be established before privilege can

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[117] John Henry Wigmore, *Evidence in Trials at Common Law*, rev. John T. McNaughton (Boston: Little, Brown, 1961), vol. 8, section 2285. Following a period of uncertainty as to whether these four conditions had been adopted as a basis for claiming privilege (see *Slavutych v. Baker* (1975), 55 DLR (3d) 224 (SCC); *Moysa v. Alta. (Labour Relations Board)* (1989), 60 DLR (4th) 1 (SCC); and Barbara Cotton, "Is There a Qualified Privilege at Common Law for Non-Traditional Classes of Confidential Communications? Maybe" (November 1990), 12 *The Advocates' Quarterly* 195-205), the Supreme Court of Canada appears to have confirmed their applicability in *Gruenke*, supra footnote 115.

[118] Supra footnote 112, at 6188.

> be conferred. In treating breach of confidence as a separate basis for excluding Professor Slavutych's confidential communications, the Supreme Court of Canada involved itself in the logical inconsistency of approving Wigmore's four principles as the appropriate test for privilege on the one hand, while holding on the other that in some circumstances confidentiality alone is a sufficient basis for the exclusion of evidence.[119]

In discussing the types of privilege that are available to protect confidential relationships, the Supreme Court of Canada in the *Gruenke* case did not broach the possibility that confidentiality alone could found a basis for privilege.[120] It therefore remains to be seen whether privilege in the *Crestbrook* case is regarded as having arisen on the basis of confidentiality or from the application of the Wigmore test.

DISCLOSURE OF TAXPAYER INFORMATION UNDER SUBSECTION 241(3)

In examining the relationship between the confidentiality requirement and subsection 241(3), the courts have held that the scheme established by Parliament for dealing with taxpayer information must be interpreted in a manner consistent with the reasons for which taxpayer information is obtained by the minister of national revenue, namely, to calculate a person's tax liability and to facilitate the collection of moneys for the fisc. In *Diversified Holdings Limited*,[121] the Federal Court of Appeal was called upon to decide whether documents seized pursuant to a certificate issued by Revenue Canada against a person not a party to the action was privileged under subsection 241(1) of the Income Tax Act. After holding that the seized documents had not been obtained by or on behalf of the minister of national revenue and therefore were not subject to subsection 241(1), the court stated:

> Suffice it to say that the appellant, in order to qualify under subsection [241](1), must contend that the documents were indeed obtained for the purposes of the Act, and yet, in order to avoid the exception of disclosure established under subsection [241](3) the appellant must submit, as she did before us, that the proceedings in question were collection proceedings that were independent from and not related to the administration and enforcement of the Act. The appellant would, therefore, need to demonstrate that documents obtained with respect to the collection proceedings were obtained "for the purposes of the Act" but that the collection proceedings themselves, were not "relating to the administration or enforcement of the Act." In view of the very clear words used in subsection 241(3), it is far from being evident that the appellant can have it both ways.[122]

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[119] Supra footnote 62, at 282.

[120] Supra footnote 115. Nor was this possibility raised by the Supreme Court of Canada in *O'Connor v. The Queen et al.*, file no. 24114, December 14, 1995 [unreported], where the question under consideration was whether and when, for the purposes of a criminal proceeding, the medical and counselling records of an alleged victim of a sexual assault should be disclosed to an alleged assailant.

[121] Supra footnote 46.

[122] Ibid., at 5032.

As Iacobucci J went on to explain in the *Slattery* case:

> Parliament has also recognized, however, that if personal information obtained cannot be used to assist in tax collection when required, including tax collection by way of judicial enforcement, the possession of such information will be useless. Disclosure of information obtained through tax returns or collected in the course of tax investigations may be necessary during litigation in order to ensure that all relevant information is before the court, and thereby to assist in the current disposition of litigation.[123]

While this interpretation of subsection 241(3) confirms that taxpayer information that is required for the purposes of an administrative or enforcement proceeding under the Income Tax Act is released completely from the strictures of subsections 241(1) and (2), it nonetheless raises a concern about the effect that the strict application of subsection 241(3) has on the willingness of taxpayers to comply with the reporting requirements of the Act, as well as a question about the relationship of this exemption to the Privacy Act and the Access to Information Act.

Expectations of Privacy in Proceedings for the Administration and Enforcement of the Income Tax Act

The disclosure of taxpayer information in an administrative or enforcement proceeding can occur in a number of ways. For example, in tax appeals under the informal procedure, the presiding judge may waive the application of the rules of evidence and permit hearsay evidence about taxpayers to be tendered through an official;[124] or, under the general procedure, information or documents provided by a taxpayer or others may be disclosed in a list of documents or in the course of examinations for discovery.[125] In either case, the complete exemption from the confidentiality requirement provided for in subsection 241(3) means that taxpayers who appeal from assessments of tax, or who become parties to other administrative or enforcement proceedings under the Income Tax Act, should expect to be treated like all litigants and therefore be ready to disclose personal and financial information that is pertinent to their action.[126] The circumstances of non-parties may, however, call for a different approach. Taxpayers' willingness to comply with the reporting requirements of the Act could be undermined if they thought their personal or financial information could be disclosed by an official, in a proceeding to

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[123] Supra footnote 30, at 444.

[124] Supra footnote 10, at section 18.15(4).

[125] Tax Court Rules (General Procedure), supra footnote 91, sections 81, 82, and 95.

[126] Taxpayers who appeal assessments of income tax can attempt to limit public access to personal and financial information disclosed at trial by applying to have their hearing held in camera. Provision for such an application in respect of hearings before the Tax Court of Canada and the Federal Court—Trial Division is made respectively in section 16.1 of the Tax Court of Canada Act, supra footnote 10, and section 179 of the Income Tax Act. For a discussion of the circumstances that would justify granting such an application, see *C.D. v. MNR*, 91 DTC 5210 (FCA); and *Roseland Farms Ltd. v. The Queen (No. 2)*, [1995] FCJ no. 1666 (FCA), rev'g. 93 DTC 5008 (FCTD).

which they are not party, without their knowledge and without regard to their expectations of privacy vis-à-vis litigants and the public at large. It therefore should not come as a surprise that, notwithstanding the comments of the Federal Court—Trial Division and the Federal Court of Appeal in the *Huron Steel* case[127] and the comments of the Federal Court of Appeal in the *Bassermann* case,[128] the same courts either have received, or have approved the practice of receiving, submissions on how to handle the taxpayer information of non-parties.

In *Amp of Canada Ltd. v. The Queen*,[129] the minister of national revenue assessed a taxpayer that was in the business of selling in Canada products manufactured by its non-resident parent, on the ground that the cost for these products was not as high as the amounts used by the taxpayer in its returns. In the course of examinations for discovery, the Crown disclosed that comparisons between the profits of the taxpayer and those of its competitors had been made using their respective tax returns and financial statements. The Crown objected to divulging the results of these comparisons, and the taxpayer applied for an order for the production of its competitors' financial statements. The Crown treated the ensuing interlocutory proceeding as an interpleader involving the taxpayer and its competitors, and adopted a neutral stance. On the basis of the principles enunciated in the *Huron Steel* case, the presiding motions judge granted the taxpayer's application, subject, however, to unspecified directions respecting confidentiality.[130] In the *Bassermann* case, Mahoney JA stated that the policy arguments made by the minister for not disclosing non-parties' returns of income might have been very persuasive in obtaining a different disclosure order if a timely appeal had been made to the Federal Court of Appeal to set aside the order that was made.[131] While Mahoney JA did not give details of the policy arguments that were advanced, they likely derived from two concerns: first, the Crown's interest in the interpretation and application of the Income Tax Act, which extends beyond the circumstances of any particular appeal and includes maintaining the efficacy and integrity of the self-assessment system; and second, the concomitant fear that, by substantially interfering with non-litigants' privacy, the discovery process could undermine the expectations of privacy that underlie the reporting requirements of the Act.

Disclosure of Taxpayer Information at Examinations for Discovery

In coping with taxpayers' expectations of privacy vis-à-vis their taxpayer information, the Crown is aided by constraints already in place on the use

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[127] Supra footnotes 103 and 107.

[128] Supra footnote 2.

[129] 87 DTC 5157 (FCTD).

[130] Ibid., at 5158.

[131] Supra footnote 2, at 108.

that can be made of information or documents obtained through examinations for discovery. In most jurisdictions, litigants' privacy is protected to an extent that is consistent with the role and objectives of discovery.[132] The nature of the protection is defined by the following two principles:

> (1) There is an implied undertaking by a party to whom documents are produced that he or she will not use them for collateral or ulterior purposes; any such use of the documents is a contempt of court.
>
> (2) There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes; any such use is a contempt of court.[133]

Similar restrictions have been held to apply to the Trial Division of the Federal Court in the context of an appeal under the Income Tax Act.[134] While the implied undertaking of confidentiality extends to documents relating to non-parties, such documents would nonetheless remain disclosable to persons in relation to whom non-parties hold expectations of privacy, namely, litigants who are interested in using these documents only for the purpose of their own appeals. The failure of the undertaking to meet these expectations necessarily engages the Crown's interest in mitigating the extent to which the discovery process undermines taxpayers' confidence in the self-assessment system.

In examinations for discovery, the permissible scope of inquiry is limited under section 95 of the Tax Court Rules (General Procedure) to any proper question relating to any matter in issue in the proceeding.[135] Matters that can possibly affect the issues between the parties are proper subjects

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[132] For example, see John B. Laskin, "The Implied Undertaking in Ontario" (April 1990), 11 *The Advocates' Quarterly* 298-317, at 304-5.

[133] Ibid., at 298-99. Until 1994, when, by a 2 to 1 majority, the Ontario Court (General Division) held that the implied undertaking was not part of the law of Ontario and should not be adopted (*Goodman v. Rossi* (1994), 21 OR (3d) 112, at 125), British Columbia appeared to be the only jurisdiction that expressly rejected this rule (*Kyuquot Logging, etc.* (1986), 5 BCLR (2d) 1 (CA); and *Cheung v. British Columbia (Attorney General)* (1993), 16 CPC (3d) 98 (BC SC)). However, in 1995, the British Columbia Court of Appeal reversed its position in *Kyuquot Logging* (*Hunt v. T & N plc* (1995), 34 CPC (3d) 133) and the Ontario Court of Appeal overturned the decision of the Ontario Court (General Division) in *Goodman* ((1995), 125 DLR (4th) 613). As a result, there is now an implied undertaking in both of these provinces.

[134] *The Queen v. Ichi Canada Ltd.*, [1991] 2 CTC 230 (FCTD). After noting the existence of the implied undertaking in Ontario, Alberta, Manitoba, and New Brunswick, Reed J stated, at 235: "In my view, an implied undertaking restricting the use of information (transcripts and documents) obtained on discovery applies to the Federal Court discovery process." In so holding, Reed J declined to follow the decision of the British Columbia Court of Appeal in *Kyuquot Logging*, supra footnote 133.

[135] The wording of section 95 of the Tax Court Rules (General Procedure), supra footnote 91, allows a wider latitude of discovery than that permitted under rule 458 of the Federal Court Rules, CRC 1978, c. 663, as amended; and in that regard, it mirrors the approach embodied in rule 200 of the Alberta Rules of Court, Alta. reg. 338/83, as amended. The relevant excerpts of the latter two rules respectively read as follows:

(The footnote is continued on the next page.)

for examination.[136] As a result, litigants are given the opportunity of full and complete discovery before trial. While the question whether to disclose non-party taxpayer information is usually broached through requests for the information at examinations for discovery, the issue also arises at the document discovery stage. Under the general procedure of the Tax Court Rules, parties have the option of filing and serving on each other a list of documents providing partial or full disclosure.[137] In the former case, the list of documents is prepared with reference to documents that the parties anticipate using to establish or rebut allegations of fact set forth in their pleadings.[138] In the latter case, the parties file and serve on each other, either by consent or pursuant to an order of the court, "a list of all documents which are or have been in that party's possession, custody or power relating to any matter in question between or among them in the appeal."[139] However, both forms of document disclosure invite similar procedural responses to the confidentiality issue.

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[135] Continued . . .

458(1)(a) A person who is being examined for discovery shall answer, to the best of the person's knowledge, information and belief, any question that is relevant to any unadmitted allegation of fact in any pleading filed in the action by the party being examined or the examining party.

200(1) Any party to an action . . . may be orally examined on oath or affirmation before the trial of the action touching the matters in question by any person adverse in interest, without order.

The scope of questions that may be properly asked in examination for discovery under rule 200 of the Alberta Rules of Court has been considered in several reported decisions, including *Czuy v. Mitchell* (1976), 72 DLR (3d) 424, at 427 (Alta. CA). In that case, Haddad JA stated:

> The general rule, as I conceive it, which has emerged from the leading authorities is expressed with clarity and simplicity in the headnote of the report of *Rural Municipality of Mount Hope No. 279 v. Findlay*, [1919] 1 W.W.R. 397, as follows:
>
> > The greatest latitude should be allowed to a party who is examining an adverse party for discovery so that the fullest inquiry may be made as to all matters which *can possibly affect* the issues between the parties [the italics are Haddad JA's].

The foregoing approach to examination for discovery was quoted with approval by Harradence JA in *Leeds v. Alta.*, [1989] 6 WWR 559, at 573 (Alta. CA). For further cases and commentaries respecting the scope of examination for discovery under section 95 of the Tax Court Rules (General Procedure) and rule 200 of the Alberta Rules of Court, see McMechan and Bourgard, supra footnote 9, at 372-80; and W.A. Stevenson and J.E. Cote, *Civil Procedure Guide 1992* (Edmonton: Juriliber, 1992), 574-609.

[136] However, under rule 458 of the Federal Court Rules, supra footnote 135, third-party information appears to be disclosable at examinations for discovery only if it was relied on by the minister of national revenue in assessing a taxpayer: *Oro Del Norte, SA v. The Queen*, 90 DTC 6373 (FCTD); and *Hokhold v. The Queen*, 93 DTC 5339 (FCTD). It remains to be seen whether the same approach will be adopted by the Tax Court of Canada in relation to third-party information under section 95 of the Tax Court Rules (General Procedure), supra footnote 91. For a discussion of the issue in the context of transfer-pricing disputes, see Innes and McCart, supra footnote 69.

[137] Supra footnote 91, sections 81 and 82.

[138] Ibid., section 81.

[139] Ibid., section 82.

As already noted, section 82 of the Tax Court Rules (General Procedure) requires parties to list all documents that relate to a matter in issue. The disclosure in these circumstances is more extensive than one conducted on the basis of relevancy. As Mahoney JA explained in the *Bassermann* case:

> In my opinion, the words "relating to any matter in question" are broad enough to respect the order made and the words "relating to the matter within the scope of the proceedings" in the order are broad enough to require production of the third party tax returns in issue. It is not necessary that they be relevant to any issue to be resolved in the litigation, only that they relate to a matter in question.[140]

Section 82 therefore sets up an objective test that requires parties to review carefully their respective pleadings and to disclose all documents that touch on any question in dispute. In so doing, they must decide on the approach that they will take in identifying documents that are subject to disclosure. From the perspective of the Crown, this should include taking into account the expectation of privacy that non-party taxpayers hold vis-à-vis their taxpayer information. One way it can do this is by adopting a restrictive approach to document disclosure and producing only excerpts of third-party documents that in its view are clearly related to a matter in issue.[141] The broad scope for oral discovery provided for in section 95, together with the power given to the court in section 88 to deal with incomplete affidavits of documents or improper claims of privilege,[142] permits a party who is dissatisfied with such disclosure to challenge a list of documents (full disclosure) through requests for further disclosure and additional information. A less adversarial way of proceeding would be for the Crown to list in schedule B of the form prescribed by the Tax Court Rules (General Procedure) for lists of documents (full disclosure), documents that it does not consider to be clearly related to a matter in issue. Schedule B provides:

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[140] Supra footnote 2, at 107.

[141] For example, in *IAS Computer v. Mandala* (1980), 40 NSR (2d) 541, at 545 (SCTD), a party producing documents was allowed to delete names of clients. In *NS Power v. Surveyor, Nenninger & Chevert Inc. et al.* (1987), 78 NSR (2d) 217 (CA), aff'g. (1986), 74 NSR (2d) 327 (SCTD), minutes of a meeting of the board of a company where legal advice had been discussed were permitted to be produced with the parts referring to the advice deleted.

[142] Section 88 of the Tax Court Rules (General Procedure), supra footnote 91, provides:

> Where the Court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the Court may,
>
> (a) order cross-examination on the affidavit of documents,
>
> (b) order service of a further and better affidavit of documents,
>
> (c) order the disclosure or production for inspection of the document or a part of the document, if it is not privileged, and
>
> (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

> Documents that are or were in the possession, control or power of the party that the party objects to producing on the grounds that,
>
> > (State ground of objections. Number each document consecutively. Set out the nature and date of the document and other particulars sufficient to identify it).[143]

A possible ground of objection could therefore be that, because of concerns about confidentiality that the Crown has in relation to a third-party document and, in particular, whether it relates to a matter in issue and, if so, whether it should be disclosed in whole or in part, neither information contained in the document nor the document itself will be respectively disclosed or produced without directions from the court.

Since the Crown discharges its obligations under section 81 of the Tax Court Rules (General Procedure) by disclosing only documents that help its case, the form of disclosure specified for a list of documents (partial disclosure) does not make provision for a listing similar to schedule B of a list of documents (full disclosure),[144] there being no reason to permit a party to escape discovery of documents it expects to rely on at trial. Under this regime, the Crown's interest in sustaining the policy underlying section 241, and in promoting compliance with the reporting requirements of the Act, is generally served through the adversarial process. For example, where a third-party return has been relied on in the assessment of a taxpayer, only as much of the return as is expected to be relied on and is necessary for identifying the document needs to be disclosed. It is then up to the taxpayer's counsel at the examination for discovery, first, to request disclosure of the remainder of the return; second, to inquire whether the minister possesses other documents that may be relevant to the action; and third, to challenge the Crown's refusal to disclose all or part of any third-party documents. However, where the Crown fears that disclosing even an excerpt from a relevant non-party document may adversely affect the willingness of taxpayers to fully report their financial affairs for the purposes of the Income Tax Act, as it might if it involved the disclosure of sensitive information to a business competitor, the adversarial process alone can no longer be relied on to balance taxpayers' expectations of privacy with the Crown's need for such information in defending an assessment. In these circumstances, the Crown will likely turn to the court for assistance. One way it can do this is by amending the form specified for lists of documents (partial disclosure) to include a schedule that permits the Crown to list documents it objects to producing without first obtaining directions from the court.[145] The court's involvement can then be triggered either by the Crown through an application for directions or by an appellant through an application for

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[143] Ibid., form 82(3), schedule B.

[144] Ibid., form 81.

[145] Section 5 of the Tax Court Rules (General Procedure), ibid., provides, "The forms in Schedule I shall be used where applicable and with variations as the circumstances require."

the production of documents.[146] Interventions by third parties have been countenanced, if not welcomed, by the Federal Court—Trial Division. For example, in the *Amp* case,[147] the motions judge acceded to a procedure involving the notification of third parties of the plaintiff's application to compel production by the Crown of their returns, which the minister had relied on in assessing the plaintiff. A similar procedure was followed by the court in the *Crestbrook* case.[148] The entitlement of the Tax Court of Canada to hear and act on similar third-party interventions derives from its inherent jurisdiction over its own process, as well as section 28 of the Tax Court Rules (General Procedure).[149]

Relationship of Subsection 241(3) to the Privacy Act and Access to Information Act

As noted earlier, the Privacy Act[150] and the Access to Information Act[151] establish a general framework for the protection of personal information held or controlled by the federal government.[152] Section 3 of the Privacy Act defines "personal information" as information about an identifiable individual that is recorded in any form and then lists types of information that are included in or excluded from this definition. There is little doubt

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[146] Ibid., section 4(2).

[147] Supra footnote 129.

[148] Supra footnote 110.

[149] Section 13 of the Tax Court Act, SC 1980-81-82-83, c. 158, provides, "The Court has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record." See also *The Queen v. Lee*, 91 DTC 5596 (FCA); and *Curoe v. MNR*, 91 DTC 782 (TCC). Section 28 of the Tax Court Rules (General Procedure), supra footnote 91, provides:

> (1) Where it is claimed by a person who is not a party to a proceeding
>
> (a) that such person has an interest in the subject matter of the proceeding,
>
> (b) that such person may be adversely affected by a judgment in the proceeding, or
>
> (c) that there exists between such person and any one or more parties to the proceeding a question of law or fact or mixed law and fact in common with one or more of the questions in issue in the proceeding,
>
> such person may move for leave to intervene.
>
> (2) On the motion, the Court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding, and the Court may,
>
> (a) allow the person to intervene as a friend of the Court and without being a party to the proceeding, for the purpose of rendering assistance to the Court by way of evidence or argument, and
>
> (b) give such direction for pleadings, discovery or costs as is just.

[150] Supra footnote 22.

[151] Supra footnote 23.

[152] For a general discussion of the relationship between litigation and access and privacy legislation, see Platt, supra footnote 27.

that "taxpayer information," which is not included in either list, constitutes a form of personal information. The disclosure of this information is governed by the strictures and exemptions set out in section 8 of the Privacy Act and section 19 of the Access to Information Act. Section 8 of the Privacy Act prohibits a government institution from disclosing personal information under its control without the consent of the individuals to whom it pertains unless the disclosure is made in accordance with this section. Section 19 of the Access to Information Act prohibits the head of a government institution from disclosing any record requested under the Act that contains personal information as defined in section 3 of the Privacy Act unless he or she does so pursuant to a request under the Access to Information Act and such disclosure is made in accordance with section 8 of the Privacy Act.

As regards the use that can be made of personal information in legal proceedings, sections 8(2)(c) and (d) of the Privacy Act provide:

> Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed . . .
>
> (c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purposes of complying with the rules of court relating to the production of information;
>
> (d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada.

Since individuals' personal information can be disclosed without their consent only if the disclosure is made in accordance with section 8, and given that the exemptions in sections 8(2)(c) and (d) are "subject to any other Act of Parliament," these exemptions are inapplicable to proceedings that are subject to the strictures of subsections 241(1) and (2) of the Income Tax Act.[153] They may remain in force, however, for proceedings exempted from these strictures by subsection 241(3).[154] If so, a question then arises as to whether the exemptions defined by sections 8(2)(c) and (d) are equal in scope to the exemption defined by subsection 241(3). Sections 8(2)(c) and (d) differ from subsection 241(3) in that their exemptions are defined by the purposes for which they permit personal information to be disclosed. However, these purposes appear to take in most, if not all, the circumstances in which an official could be called upon to disclose such information in a proceeding for the administration and enforcement of the Income Tax Act. Section 8(2)(c) allows personal information to be disclosed for the purpose of complying with a subpoena or warrant issued or an order made by a court. It also allows personal

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[153] See also section 24(1) of the Access to Information Act, supra footnote 23, discussed in footnote 27, supra.

[154] The comment of Gendreau JA in *Thibault*, supra footnote 83, at 5088, that the Access to Information Act neither added to nor detracted from section 241 admittedly suggests that sections 8(2)(c) and (d) of the Privacy Act are likely inapplicable to proceedings exempted under subsection 241(3).

information to be disclosed for the purpose of complying with the rules of court relating to the production of information, which, for appeals from assessments of tax, are principally set out in sections 81, 82, and 95 of the Tax Court Rules (General Procedure).[155] Section 8(2)(d) deals specifically with the entitlement of the attorney general of Canada to use personal information in legal proceedings involving the Crown in right of Canada and the government of Canada. Unlike section 8(2)(c), section 8(2)(d) does not limit the use that can be made of personal information in such proceedings. It is therefore arguable that, to the extent that section 8(2)(c) does not completely exempt taxpayer information from the strictures of the Privacy Act and the Access to Information Act,[156] the shortfall is made up by section 8(2)(d).

THE RIGHT TO APPEAL UNDER SUBSECTION 241(6)

Subsection 241(6) provides for an appeal from an order or direction made in the course of or in connection with any legal proceeding that requires the minister of national revenue, or an official or authorized person, to give or produce evidence relating to taxpayer information. The appeal is initiated by notice served on all interested parties and, depending on whether the impugned order or direction is made by a court or tribunal established pursuant to provincial or federal laws, is made either to a provincial court of appeal or to the Federal Court of Appeal. Subsection 241(7) provides that the applicable rules of practice and procedure are those that from time to time govern these appeals, with such modifications as circumstances require. Subsection 241(8) stays the operation of the order or direction appealed from until judgment is pronounced.

While a literal reading of subsection 241(6) may lead one to conclude that it applies to all proceedings, including appeals under the Income Tax Act, it appears that a contextual reading of its terms properly restricts its applicability to proceedings not encompassed by subsection 241(3). If the purpose of subsection 241(6) is to provide a means of enforcing the strictures of subsections 241(1) and (2), then, given that criminal proceedings as well as administrative and enforcement actions under the Income Tax Act are exempted from these strictures by subsection 241(3), subsection 241(6) can have no application to such proceedings. If it were otherwise, the Crown could resort to subsection 241(6) in the course of a tax appeal

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[155] Supra footnote 91.

[156] For example, in attempting to comply with the document disclosure rules, the Crown could fall outside the ambit of section 8(2)(c) of the Privacy Act by disclosing more than is required or permitted by these rules. However, the likelihood of this occurring is remote, given the courts' restrictive interpretation of the strictures in the Privacy Act and the Access to Information Act (see *Reyes v. Secretary of State* (1984), 9 Admin. LR 296 (FCTD); *Maislin Ind. Ltd. v. Minister for Industry, Trade and Commerce*, [1984] 1 FC 939 (FCTD); and *Ternette v. Canada*, [1992] 2 FC 75 (FCTD)), coupled with their insistence that parties provide each other with the fullest pre-trial disclosure (see *R v. Stinchcombe* (1991), 68 CCC (3d) 1, at 6 (SCC); and *Irish Shipping Ltd. v. The Queen*, [1974] 1 FC 445, at 449 (FCTD).

and not have to await a court's final judgment before seeking an appellate review of an adverse ruling at trial on the admissibility of taxpayer information. Trials might then have to be adjourned each time an appeal was initiated on account of the stay that would be imposed on the operation of the order by subsection 241(8). Not only would this arrangement frustrate one of the principal aims of the informal and general procedures of the Tax Court Rules, namely, the speedy resolution of tax disputes; it would also stand in opposition to the general rule that no appeal lies from a trial proceeding except following its conclusion when judgment is rendered.[157]

The question that the foregoing discussion begs, however, is whether it is always possible a priori to determine if a proceeding is exempted under subsection 241(3) and hence not subject to the appeal procedure set out in subsections 241(6), (7), and (8). While there can be no doubt about criminal proceedings or appeals from assessments under the Income Tax Act, the finding by the Supreme Court of Canada that the action in the *Slattery* case[158] constitutes an administrative or enforcement proceeding, even though the minister of national revenue was not a party, makes it clear that the nature of a proceeding and its status under section 241 will not always be evident. Since the compellability of an official turns on whether the proceeding is exempted under subsection 241(3), it is submitted that the Crown not only can, but is obliged to, resort to subsections 241(6), (7), and (8) when there is any doubt on this question.

CRIMINAL AND CIVIL LIABILITY FOR BREACHING THE CONFIDENTIALITY REQUIREMENT

Subsections 239(2.2) and (2.21) of the Income Tax Act impose criminal liability on those who improperly disclose taxpayer information. Subsection 239(2.2) provides:

> Every person who
>
> (a) contravenes subsection 241(1), or
>
> (b) knowingly contravenes an order made under subsection 241(4.1)
>
> is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months, or to both.

Subsection 239(2.21) provides:

> Every person
>
> (a) to whom taxpayer information has been provided for a particular purpose under paragraph 241(4)(b), (c), (e), (h) or (k), or
>
> (b) who is an official to whom taxpayer information has been provided for a particular purpose under paragraph 241(4)(a), (d), (f) or (i)

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[157] For example, see *Rahmatian v. HFH Video Biz, Inc.* (1991), 79 DLR (4th) 763 (BC CA); *NB Telephone Co. v. John Maryon Int'l Ltd.* (1980), 116 DLR (3d) 581 (NB CA); and *St. John Shipbuilding v. Kingsland Maritime Corp.* (1978), 93 DLR (3d) 91 (FCA).

[158] Supra footnote 30.

> and who for any other purpose knowingly uses, provides to any person, allows the provision to any person of, or allows any person access to, that information is guilty of an offence and liable on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding 12 months, or to both.[159]

Unlike paragraph 239(2.2)(b), the general sanction in paragraph 239(2.2)(a) does not need to specify that it applies to officials who knowingly use or disclose taxpayer information for an improper purpose since the prohibition in subsection 241(1) is already cast in these terms.[160] It therefore appears that decisions that are made in good faith to use or disclose taxpayer information for a purpose that is thought to be permitted under the Income Tax Act, but which contravene the confidentiality requirement, fall beyond the reach of subsections 239(2.2) and (2.21). The question this raises, however, is whether they are actionable in negligence.[161]

As the decision of Muldoon J in *Wilder et al. v. The Queen et al. (No. 2)*[162] illustrates, even though the disclosure of taxpayer information that occurs outside the scope of subsection 241(3.1), (4), (4.1), or (5) will not per se give rise to liability in negligence, it can nonetheless constitute the basis for such an action. The plaintiffs in that case brought an action against the Crown alleging that Revenue Canada gave confidential tax

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[159] Subsection 239(2.22) provides, "In subsection (2.21), 'official' and 'taxpayer information' have the meanings assigned by subsection 241(10)."

[160] Moreover, since paragraph 239(2.2)(a) is a criminal provision, it follows that, in the case of officials, it is directed only at wilful or reckless acts of disclosure made outside the scope of their duties. In that regard, the Supreme Court of Canada in *The Queen v. Sault Ste. Marie*, [1978] 2 SCR 1299, identified three types of offences: mens rea offences, strict liability offences, and absolute liability offences. Criminal liability arises only in the context of mens rea offences, which require the existence of a material act in violation of the law and a culpable state of mind in the person committing that act. A culpable state of mind is characterized by recklessness, intent, or knowledge. In strict liability offences, the mere commission of a material act in violation of the law results in a presumption of liability, although the accused may counter this presumption by proving that he or she took all necessary precautions. In absolute liability offences, the accused cannot so exculpate himself or herself; consequently, the mere commission of the proscribed act is sufficient ground for conviction.

[161] The Crown Liability and Proceedings Act, RSC 1985, c. C-50, as amended, establishes the Crown's vicarious liability for the torts of its servants. Section 3 of this Act provides:

> The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> (a) in respect of a tort committed by a servant of the Crown; or
>
> (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

For a recent discussion of the principles of Crown liability for the torts of its servants, see *Comeau's Sea Foods v. Canada* (1995), 24 CCLT (2d) 1 (FCA), as well as the materials in (November 1995), 6 *National Journal of Constitutional Law* 1-160, collected in conjunction with the Symposium on Government Liability sponsored by the Department of Justice (Canada) and held in Ottawa on March 9, 1995.

[162] 87 DTC 5183 (FCTD).

information pertaining to the taxpayers to investigators employed by the US Internal Revenue Service (IRS) and that they suffered damages as a result. The plaintiffs invoked section 241 as setting a standard of care and alleged negligence on the part of the Revenue Canada officials in breaching that duty. The plaintiffs subsequently amended their statement of claim to allege conspiracy on the part of the IRS investigators and applied for an order for service ex juris. To obtain this order, the plaintiffs had to show that they had a good cause of action and that such action was within the jurisdiction of the Federal Court—Trial Division. Muldoon J held that both conditions were satisfied and granted the application.

In concluding that the plaintiffs could found their action in negligence on an alleged breach of section 241, Muldoon J relied on the decision of the Supreme Court of Canada in *The Queen v. Saskatchewan Wheat Pool* wherein Dickson CJ, in delivering the judgment of the court, enunciated the following principles:

> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
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> 2. The notice of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.
>
> 5. In the case at bar negligence is neither pleaded nor proven. The action must fail.[163]

After noting that negligence was alleged in the case before him, Muldoon J concluded that, despite the provision of penal consequences for officials and authorized persons who commit the offences created by subsection 241(9),[164]

> Parliament appears clearly to have intended to provide protection against unauthorized disclosure for a class of persons in which the plaintiffs are included. Section 241, taken as a whole, is much more indicative of that intention to protect confidentiality of the plaintiffs' records, than of a limited intention merely to discipline wayward officials or persons, who could in any event be dealt with in terms of their employment status.[165]

Subsequently, in the course of explaining why the cause of action was within the jurisdiction of the Federal Court—Trial Division, Muldoon J further stated:

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[163] *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205, at 227-28, quoted ibid., at 5185.

[164] The provision has since been re-enacted as subsection 239(2.2).

[165] Supra footnote 162, at 5185.

> In the case at bar it would seem obvious that there is a body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. It is a small body, being section 241 of the Act, passed for the protection of taxpayers and others from whom the Minister collects information, returns and other documents. Its basic purpose may well be to protect the Revenue, but it aims to achieve that by protecting taxpayers and others. The plaintiffs are such taxpayers or other persons. The Minister's officials' duty not to divulge, and the plaintiffs' correlative right to have their information, books, records, returns or other documents kept from being revealed by the Minister's officials, are concerned and born and reside in section 241 which is their *sine qua non*.[166]

The duty of care owed by officials to taxpayers under section 241 remains to be defined by the courts. Perhaps at minimum officials need to be mindful of the purposes for which disclosure is permitted and to act accordingly with due care and attention. However, whatever the appropriate duty of care is in relation to disclosures made pursuant to subsections 241(3.1), (4), (4.1), and (5), the question arises whether officials are also subject to a duty of care in respect of disclosures permitted under subsection 241(3). While it is arguable that the scope of subsection 241(3), which completely exempts specified proceedings from the strictures of the confidentiality requirement, precludes any duty of care, it can also be argued that the applicability of subsection 241(3) presumes bona fides and no fundamental errors of conduct on the part of officials. If so, the actions of officials who intentionally and knowingly, or through a dereliction of duty, disclose or permit to be disclosed taxpayer information during an exempted proceeding that is completely unrelated to a matter in issue may fall outside the ambit of subsection 241(3) and thereby become exposed to civil liability. Although a plain and grammatical reading of subsection 241(3) seems to favour the former interpretation, the latter, purposive reading is not without precedent. For example, provisions in the Income Tax Act that stipulate that liability for tax is unaffected by ministerial errors[167] or irregularities in assessments[168] have been narrowed through judicial consideration to recognize that certain substantial and fundamental errors should not be subject to shelter.[169] It is therefore possible that judicial consideration of subsection 241(3) could result in a similar narrowing of its scope.

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[166] Ibid., at 5188.

[167] Subsection 152(8).

[168] Subsection 152(3) and section 166.

[169] Per Cullen J in *The Queen v. Riendeau*, 90 DTC 6076, at 6079 (FCTD), citing *Guaranty Properties Limited et al. v. The Queen*, 87 DTC 5124 (FCTD) and *The Queen et al. v. Optical Recording Corporation*, 87 DTC 5248 (FCA), aff'g. 86 DTC 6465 (FCTD). As Cullen J explained, at 6079, "[The *Optical Recording* case] involved the Minister issuing an assessment but also advising the taxpayer that the taxes were not yet owing. Later, without warning, the Minister took action which effectively froze the taxpayer's funds because of their non-payment. This application was raised on questions of 'administrative illegality, unfair treatment and estoppel.' Here the court found that the actions of

(The footnote is continued on the next page.)

CONCLUSION

By including a confidentiality requirement in the Income Tax Act, Parliament has recognized that both taxpayers and the minister of national revenue have an interest in keeping private the personal and financial information that taxpayers and others provide to the minister. This requirement strikes a balance between a taxpayer's expectation that taxpayer information will be kept private and the minister's need to use such information in order to maximize tax revenues on behalf of the Crown. The balance is achieved through a general prohibition against the disclosure of taxpayer information, a restriction on the compellability of officials to testify at legal proceedings in respect of taxpayer information, and two categories of exemptions. The first category allows taxpayer information to be disclosed for specified purposes to various federal and provincial government departments and, in very limited circumstances, to non-officials. The second category completely exempts criminal proceedings and administrative and enforcement proceedings under the Income Tax Act and other federal enactments from both the prohibition against disclosure and the limits placed on the compellability of officials to testify at such proceedings. While the notion of an "administrative and enforcement proceeding" is not defined, it includes appeals from reassessments of tax, as well as collection proceedings where the Crown's entitlement to collect taxes is in issue, even if it is not a party,[170] and it may also include actions for declaratory relief where the issue concerns a person's liability to taxation.[171]

Notwithstanding that criminal proceedings and administrative and enforcement proceedings under the Income Tax Act are exempted from the strictures of section 241, a court seized with the conduct of an exempted proceeding has discretion to impose conditions to ensure that taxpayer information is disclosed and handled in a way that conforms with the policy objectives of the confidentiality requirement.[172] The task of engaging the court in this matter falls upon the Crown, which, unlike a taxpayer appealing from an assessment, is concerned not only with the outcome of a particular appeal, but also with the proper functioning of the Income Tax Act as a whole. The latter includes reconciling the various objectives of the Act, from maximizing tax revenues to promoting specific incentive

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[169] Continued . . .
the Minister and his officials was [sic] so infected with "error of law, illegal conduct, excess jurisdiction and unfair pouncing without reasonable notice" that the assessment was declared a nullity. On appeal, the Minister's application was dismissed and the trial judge's decision was upheld." The decision of Cullen J was affirmed by the Federal Court of Appeal, 91 DTC 5416. As an aside, although the Federal Court of Appeal reversed the decision of the Trial Division in *Guaranty Properties* (90 DTC 6363), it did so without considering the curative provisions of the Income Tax Act.

[170] *Slattery*, supra footnote 30.

[171] *Erasmus*, supra footnote 92, and *Benoit*, supra footnote 95.

[172] *Amp*, supra footnote 129, and *Crestbrook*, supra footnote 110.

and redistributive programs.[173] Indeed, the knowledge that the Crown is willing and able to play this role significantly contributes to the operation of the self-assessment system of taxation by assuring taxpayers that, even in the course of exempted proceedings, their interest in keeping private their personal and financial affairs is being taken into account and balanced against the overall aims of the Income Tax Act.

[173] As Estey J explained in *Stubart Investments Limited v. The Queen*, 84 DTC 6305, at 6322 (SCC), "Income tax legislation, such as the federal Act in our country, is no longer a simple device to raise revenue to meet the cost of governing the community. Income taxation is also employed by government to attain selected economic policy objectives. Thus, the statute is a mix of fiscal and economic policy. The economic policy element of the Act sometimes takes the form of an inducement to the taxpayer to undertake or redirect a specific activity. Without the inducement offered by the statute, the activity may not be undertaken by the taxpayer for whom the induced action would otherwise have no *bona fide* business purpose."