

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230228**

**Docket: A-58-22**

**Citation: 2023 FCA 43**

**CORAM: STRATAS J.A.  
LOCKE J.A.  
ROUSSEL J.A.**

**BETWEEN:**

**BMO NESBITT BURNS INC.**

**Appellant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

Heard at Toronto, Ontario, on February 28, 2023.  
Judgment delivered from the Bench at Toronto, Ontario, on February 28, 2023.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**LOCKE J.A.**

Federal Court of Appeal



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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on February 28, 2023).**

**LOCKE J.A.**

[1] The appellant, BMO Nesbitt Burns Inc. (NBI), appeals a Federal Court decision (*per* Justice Catherine M. Kane, 2022 FC 157) that granted an application by the respondent, the Minister of National Revenue (the Minister), pursuant to subsection 231.7(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (the Act), ordering NBI to provide the Minister with an

unredacted version of a document referred to as the Master Summary Pricing Model, or Spreadsheet. The application was made by the Minister after she failed to obtain the unredacted Spreadsheet from NBI in response to a request pursuant to section 231.1 (or possibly 231.2) of the Act.

[2] NBI argues that the Federal Court's decision should be set aside because providing the unredacted Spreadsheet would reveal privileged legal advice. NBI also argues that an order pursuant to subsection 231.7(1) of the Act is inappropriate in the circumstances of this case because (i) such an order must be tied to a tax audit, and all of the steps in the relevant audit in this case had been completed before the Federal Court's order, and (ii) the Federal Court's order amounts to a requirement that NBI conduct a self-audit, which is inappropriate.

[3] We are not persuaded by NBI's arguments, and we see no reviewable error by the Federal Court.

[4] NBI's argument on privilege is effectively a dispute over the Federal Court's weighing of the evidence. The parties agree that NBI received the legal advice in question, that such advice is privileged, and that it should not be ordered to reveal such advice. The parties also agree that NBI bore the burden of proving that providing the unredacted Spreadsheet would reveal the privileged legal advice. The dispute here is really about whether NBI met that burden. It cites affidavit evidence of two of its employees on the point, and argues that the Federal Court erred in refusing, without an evidentiary basis, to recognize the consequent exposure of privileged information.

[5] The Federal Court considered NBI's evidence but found it vague and insufficient to establish that providing the unredacted Spreadsheet would reveal the privileged legal advice (see paragraphs 93 to 108 of the Federal Court's reasons). NBI argues that the Federal Court erred in putting it in an untenable position whereby it would have to reveal privileged information in order to adduce evidence of sufficient detail to convince the Federal Court that privileged information would be revealed.

[6] NBI has not convinced us that the Federal Court made any error of law, or any palpable and overriding error of fact or of mixed fact and law, in its decision in this regard. It was open to the Federal Court to find NBI's evidence insufficient. NBI has also not convinced us that it could have corrected this insufficiency if it had referred to privileged information. Moreover, we do not accept that NBI's concern about the need to expose privileged information to fully respond to the Minister's application was insurmountable. NBI attempts before this Court to hide behind the same vagueness about which the Federal Court expressed concern.

[7] NBI's other argument that the Minister's application should not have been granted in the absence of an ongoing tax audit must also fail. Firstly, the Federal Court found at paragraph 125 of its reasons that, at the time of its decision, NBI's audit in question (concerning its 2016 taxation year) had not concluded. This was a factually suffused conclusion, and NBI has not convinced us that it was vitiated by palpable and overriding error. NBI itself argues orally merely that the audit was well advanced, not complete. Moreover, there is no doubt that the audit was ongoing when the Minister first requested the unredacted Spreadsheet. The Minister's reassessment, which NBI argues ended the audit, came later. We accept the Minister's argument

that it cannot have been Parliament's intent to permit the target of an audit to avoid an order pursuant to subsection 231.7(1) of the Act by delaying compliance with a document request until after issuance of a notice of reassessment. There are time limits for such notices, and the issuance thereof does not necessarily indicate that the questions that gave rise to the audit, and the need for the requested document, have been addressed to the Minister's satisfaction. To conclude otherwise would reward non-compliance with legitimate document requests from the Minister.

[8] Finally, we see no reversible error in the Federal Court's rejection of NBI's submission that ordering production of the unredacted Spreadsheet amounts to requiring NBI to conduct a self-audit or to reveal its "soft spots". Despite NBI's submissions to the contrary, we view this as an issue of mixed fact and law. NBI has not convinced us that the Federal Court made a palpable and overriding error in this regard so as to permit us to intervene. Accordingly, we find that the decision of this Court in *BP Canada Energy Company v. Canada (National Revenue)*, 2017 FCA 61, is distinguishable.

[9] For the foregoing reasons, this appeal will be dismissed with costs.

"George R. Locke"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-58-22

**STYLE OF CAUSE:** BMO NESBITT BURNS INC. v.  
MINISTER OF NATIONAL  
REVENUE

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 28, 2023

**REASONS FOR JUDGMENT OF THE COURT  
BY:** STRATAS J.A.  
LOCKE J.A.  
ROUSSEL J.A.

**DELIVERED FROM THE BENCH BY:** LOCKE J.A.

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