Obtaining Disclosure of Secret Comparables in Canadian Transfer-Pricing Litigation: Policy and Practice

Joel Nitikman*

PRÉCIS
Les prix de transfert continuent d’être un sujet « brûlant d’actualité » pour les administrations fiscales, les spécialistes de la fiscalité internationale et leurs clients. Il a beaucoup été question, ces derniers temps, de l’utilisation, par les administrations fiscales, de soi-disant comparables secrets recueillis auprès de tiers, qui pourraient bien indiquer que les prix de transfert du contribuable ne sont pas des prix de pleine concurrence. Les contribuables et leurs conseillers s’opposent naturellement à l’utilisation de comparables secrets; les administrations fiscales partout dans le monde ont adopté diverses approches à cet égard. L’Agence des douanes et du revenu du Canada (« l’ADRC ») n’a pas clairement pris position sur la question.

Le présent article tente d’explorer l’incidence politique et pratique, pour les administrations fiscales, de l’utilisation de comparables secrets dans les litiges en matière de prix de transfert. On indique dans quelles circonstances, le cas échéant, l’ADRC devrait être autorisée à utiliser des comparables secrets pour sélectionner une cible de vérification ou étayer une évaluation des prix de transfert, et si le contribuable faisant l’objet de la vérification peut — et dans quelle mesure — obtenir de l’ADRC les comparables secrets et l’information connexe.

L’auteur conclut que, par principe, l’ADRC ne devrait pas être autorisée à utiliser des comparables secrets, que ce soit pour sélectionner les cibles de vérification ou pour fonder sa cotisation. Si, toutefois, l’ADRC utilise des comparables secrets, le contribuable devrait pouvoir obtenir de la part de l’ADRC qu’elle lui communique intégralement non seulement les comparables mais également toutes les informations connexes, incluant l’identité du contribuable dont elles proviennent, puisque c’est la seule façon pour le contribuable de vérifier la comparabilité. L’auteur fait également remarquer que des modifications législatives pourraient être nécessaires pour donner effet à ces changements.

ABSTRACT
Transfer pricing continues to be a “hot button” topic among revenue authorities, international tax experts, and their clients. One issue that has lately been much
discussed is the use by revenue authorities of so-called secret comparables, data gathered by the authorities from unrelated third parties which may indicate that the assessed taxpayer’s transfer prices are not arm’s length. Taxpayers and their advisers are naturally against the use of secret comparables; revenue authorities around the world hold varying views. The Canada Customs and Revenue Agency (“the CCRA”) has not to date taken a clear stand on the issue.

This article attempts to explore the policy and practical implications for revenue authorities of using secret comparables in transfer-pricing litigation. It discusses under what circumstances, if at all, the CCRA should be allowed to use secret comparables to select an audit target or support a transfer-pricing assessment, and whether and to what extent the assessed taxpayer may obtain disclosure of the secret comparables and related information from the CCRA.

The writer concludes that as a matter of policy the CCRA should not be allowed to use secret comparables, either to select audit targets or to form the basis of an assessment against a taxpayer. If, however, the CCRA does make use of secret comparables, the assessed taxpayer should be allowed to obtain full disclosure from the CCRA, not only of the comparables but of all information relating thereto, including the identity of the disclosing taxpayer, since that is the only way the assessed taxpayer can test the comparability of the comparable. The writer notes that legislative changes may be necessary to effect these positions.

**KEYWORDS:** TRANSFER PRICING ■ SECRET COMPARABLES ■ LITIGATION ■ DISCLOSURE ■ ACCESS TO INFORMATION ACT ■ CONFIDENTIALITY

All the Congress, all the accountants and tax lawyers, all the judges, and a convention of wizards all cannot tell for sure what the income tax law says.

—Walter B. Wriston

**INTRODUCTION**

The Canada Customs and Revenue Agency (“the CCRA”) has access to a wealth of data relating to Canadian taxpayers. These data come from the millions of tax and information returns and financial statements filed each year, as well as from Statistics Canada, Industry Canada, and other government departments and agencies (such as Veterans Affairs, Human Resources, and Natural Resources). To what extent, if any, may or should the CCRA use these data to select a specific taxpayer for audit or to form all or part of the basis of an assessment against a specific taxpayer in a transfer-pricing dispute? If the CCRA does use the data to select a target or to form the basis of an assessment, to what extent must or should the CCRA disclose those data to the taxpayer? Even if the CCRA does not use these data but they are relevant to a particular taxpayer’s transfer-pricing dispute, must the CCRA disclose them? This article attempts to address the policy and legal answers to these questions.

My position on these issues is set out here, so that the reader can measure what follows against it. In policy terms, the CCRA should not be allowed to use secret comparables either to select audit targets or to form the basis of an assessment
against an unconnected taxpayer. If, however, the CCRA does make use of such comparables, the assessed taxpayer should be permitted full disclosure, not only of the comparables but of all information relating thereto, including the identity of the disclosing taxpayer, since that is the only way the assessed taxpayer can test the comparability of the comparable. Legislative changes are necessary to implement these policy positions.

TRANSFER PRICING: A BRIEF OVERVIEW

Canada’s transfer-pricing rules are contained in section 247 of the Income Tax Act. In general, the transfer-pricing rules apply to transactions between a taxpayer or a partnership and a non-resident person with whom the taxpayer or the partnership does not deal at arm’s length, where the terms and conditions of the transaction are different from those that would have been made between parties dealing at arm’s length. The transfer-pricing rules allow the recharacterization of transactions that would not have been entered into by parties dealing at arm’s length and that can reasonably be considered not to have been entered into for bona fide purposes other than to obtain a tax benefit. Where the foregoing conditions are satisfied, subsection 247(2) provides for a mandatory adjustment to amounts used in a transaction to reflect amounts that would have been paid or received had the transaction been entered into between parties dealing with each other at arm’s length.

In addition to adjusting the transfer price, subsection 247(3) imposes a penalty on a taxpayer equal to 10 percent of the difference between the adjusted amount and the amount that can reasonably be considered to relate to a particular transaction where the parties have not made reasonable efforts to determine the arm’s-length price or allocation. Unless the taxpayer or the partnership maintains certain documentation pursuant to requirements set out in subsection 247(4), the taxpayer or the partnership is deemed not to have made reasonable efforts. The penalty applies only where the difference determined under subsection 247(3) is greater than the lesser of 10 percent of the taxpayer’s gross revenue (without reference to subsection 247(2), subsections 69(1) and (1.2), and section 245) and $5 million.

The key issue in a transfer-pricing case is whether the prices or other amounts used by the taxpayer are arm’s-length amounts. Over the years, revenue authorities, taxpayers, and tax advisers have developed various so-called methods of making that determination. The comparable uncontrolled price (CUP) method is the primary method of proving an arm’s-length price in a transfer-pricing dispute. The CUP method is nothing more than a fancy name for the commonsense idea that if taxpayer A’s prices are generally comparable to taxpayer B’s prices and taxpayer B’s prices are set in the context of an arm’s-length relationship with a third party, this is strong evidence that taxpayer A’s prices are arm’s-length prices. The CUP method is described in paragraphs 30 to 32 of Information Circular 87-2R as follows:

30. Paragraph 1.15 of the OECD Guidelines[6] indicates that the application of the arm’s length principle is generally based on a comparison of the prices, or margins,
used or obtained by non-arm’s length parties with those used or obtained by arm’s length parties engaged in similar transactions.

31. For such price or margin comparisons to be useful, the economically relevant characteristics of the transactions being compared must be at least sufficiently similar so as to permit reasonably accurate adjustments to be made for any differences in such characteristics. Transactions between other non-arm’s length parties should not be used for purposes of these comparisons, because the terms and conditions may not be arm’s length.

32. Paragraphs 1.19 through 1.35 of the OECD Guidelines indicate that a number of factors may influence the degree of comparability of transactions. These factors include:

- the characteristics of the property or services being purchased or sold;
- the functions performed by the parties to the transactions (taking into account assets used and risks assumed);
- the terms and conditions of the contract;
- the economic circumstances of the parties; and
- the business strategies pursued by the parties.7

It may be seen that for the CUP method to be at all useful to a taxpayer, he or she must have access to other taxpayers’ comparable information. Otherwise the CUP method is completely useless. On the other hand, if the CCRA has access to other taxpayers’ information but the assessed taxpayer does not, that taxpayer is at a clear disadvantage. Broadly, the points of reference in evaluating a taxpayer’s income and related pricing are the transactional terms and pricing of taxpayers in equivalent circumstances or for like transactions involving third parties. Hence, there is a premium on having access to transactional and other information of other taxpayers.

SECRET COMPARABLES: A DEFINITION

A major issue in transfer pricing is the CCRA’s ability to use information (so-called secret comparables) disclosed by one taxpayer to form all or part of a basis of assessment against another taxpayer who is unconnected to the disclosing taxpayer. For present purposes, a secret comparable may be defined as follows: information known to the CCRA about taxpayer X, including X’s name, industry, and transfer prices actually paid or payable, that is used by the CCRA in part or in whole to form the basis of a transfer-pricing assessment against an unconnected taxpayer Y.8 More generally, if the CCRA compares X’s prices to Y’s prices and finds, on the basis of that comparison, that Y’s prices do not appear to be an arm’s-length amount, then the CCRA has used a secret comparable.

It will be noted that this definition is not restricted to the actual transfer prices used by X but includes X’s name and industry. The fact that X has paid $10 per widget and Y has paid $20 is not in itself a basis for assessing Y or allowing Y to defend itself against the assessment. Y must know who X is and in what circumstances X paid $10. Was X a startup giving its customers a discount to achieve market penetration? Did X have economies of scale not available to Y? Was X charging
$10 and losing money? Many other questions could be raised which might explain the discrepancy between X’s and Y’s prices.\textsuperscript{9}

**POLICY CONSIDERATIONS**

In a tax case, there may be many issues but the subject-matter of a tax dispute is simply this: what is the correct amount of income tax owing by the taxpayer for the relevant taxation year? The basis of the assessment is irrelevant. What is important is the bottom line number: has the CCRA assessed the correct amount of tax or not?\textsuperscript{10} If the answer is yes, any appeal by the taxpayer must be dismissed, generally regardless of any procedural flaws in the assessment process,\textsuperscript{11} and in some cases even regardless of breaches by the CCRA of the taxpayer’s rights under the Canadian Charter of Rights and Freedoms.\textsuperscript{12}

It follows from this general rule that the CCRA may use any relevant information to form the basis of an assessment against a taxpayer. As a matter of policy, this is a salutary rule: taxpayers should pay the correct\textsuperscript{13} amount of tax, and the CCRA should be entitled to use any legal means to assess them for that tax.

On the other hand, a taxpayer assessed by the CCRA has the right to know the case against him.\textsuperscript{14} Notwithstanding the rule that the onus of proof in an income tax case is on the taxpayer,\textsuperscript{15} a tax case is like any other piece of civil litigation: each party should know, as thoroughly as possible, the case the taxpayer must meet.\textsuperscript{17} Factual surprises should not form the basis of tax litigation; trial by ambush is not part of the tax litigation process in Canada.\textsuperscript{18} In *Smithkline*, the court said:

The Rules [of procedure of the Tax Court of Canada] are intended to reflect the modern principle discussed in *R. v. Stinchcombe*:

Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met.\textsuperscript{19}

It follows that a competing policy consideration is the right of the assessed taxpayer to have access to all information that is relevant to the assessment, particularly, but not necessarily solely, where the CCRA has relied on the information as forming part of the basis for the assessment.\textsuperscript{20}

Yet again on the other hand (on the third hand?), a taxpayer who, whether because he is required by statute to do so or simply because he chooses to do so, gives information to the CCRA in the expectation that such information will remain confidential, has an interest in ensuring that the information remains confidential. If the taxpayer were told that the CCRA could use the data to assess an unconnected
taxpayer and that the CCRA would then have to disclose those data, as well as, perhaps, the taxpayer's identity, the taxpayer would justifiably be upset. This then is a competing policy consideration against both the use by the CCRA of the data and the assessed taxpayer's right to force disclosure of the data.

How should these three competing policy considerations be settled? One solution would be to have a rule barring the CCRA from using secret comparables to form the basis of an assessment. Another would be to have a limited form of this first rule, whereby the CCRA would be prohibited from using secret comparables if the assessed taxpayer could not understand the basis of the assessment without disclosure of the comparables. A third would be to have a rule allowing the use of secret comparables only in those (presumably rare) cases where the third-party taxpayer consented to their use and disclosure. Another possibility would be to have a rule allowing the CCRA to use secret comparables only where the information could be so summarized or otherwise redacted that disclosure would not identify the taxpayer(s) from whom the comparables were taken. Yet another suggestion would be to allow the revenue authorities (as New Zealand apparently does)\(^2\) to use secret comparables to choose an audit target but not to form the basis of an assessment against that target.

In my view, the rule that would best satisfy seemingly inconsistent and perhaps irreconcilable policy interests would be to bar the CCRA from using secret comparables altogether. No doubt this puts the interests of the assessed and disclosing taxpayers ahead of the interests of the CCRA; but the alternatives, which would either prevent the assessed taxpayer from having access to the data altogether or jeopardize to at least some degree the confidentiality of the information provided by the disclosing taxpayer, seem to me to be worse. If we are to have a self-assessment tax system that depends on the “honesty and integrity of the taxpayers for its success,”\(^2\) and if that is to form the bedrock of our tax filing policy, then confidence in the confidentiality of the information disclosed to the CCRA must be paramount. Otherwise, disclosing taxpayers will tend to fail to disclose relevant information for fear that it will be passed on to other taxpayers.\(^2\) The integrity of the system as a whole is more important than an assessment against any one taxpayer.

OTHER COUNTRIES’ CURRENT POLICIES ON THE USE OF SECRET COMPARABLES

It is beyond the scope of this article to analyze in depth the policies of different countries on the use of secret comparables. A snapshot, however, reveals the following. At least two countries, the United States\(^2\) and the United Kingdom,\(^2\) have an official policy of not using secret comparables in transfer-pricing disputes. Japan uses them,\(^2\) as do France\(^2\) and China.\(^2\) Mexico appears to be the only country that has legislation specifically permitting its revenue authorities to use them.\(^2\) Germany’s Federal Tax Court has held that the German revenue authorities may use secret comparables in a limited manner, but the decision is likely not relevant in the Canadian context owing to differences in the onus of proof between Canada and Germany.\(^\) Australia is said not to use them,\(^2\) but the case law suggests
otherwise. In a case decided in June 2000, the Dutch Court of Appeals held that the revenue authorities of the Netherlands were not allowed to use secret comparables; an appeal is pending before the Supreme Court. The OECD is said to be studying the issue but has not issued anything, even in draft form, at the present time. It is clear, then, that there is no international consensus on whether a revenue authority may use secret comparables in transfer-pricing disputes. Canada should therefore feel free to strike its own policy on this issue, without fear of being out of step with the international tax community.

THE CCRA’S CURRENT POLICY

IC 87-2R sets out the CCRA’s official policy on transfer pricing and deals specifically with the use of secret comparables in paragraphs 208 to 210. In summary, the CCRA will use secret comparables taken from a disclosing taxpayer as a basis of an assessment if necessary. The comparables will not be disclosed to the assessed taxpayer without the disclosing taxpayer’s permission or a court order. The CCRA will notify the disclosing taxpayer of the assessed taxpayer’s intentions to seek such a court order so that the disclosing taxpayer may himself seek a court order preventing disclosure to the extent possible. As noted elsewhere, this policy puts the CCRA’s interest in using secret comparables ahead of the competing interests of the disclosing and assessed taxpayers, the opposite result to the position argued above.

Recently the Internal Revenue Service (“the IRS”) suggested that the CCRA was backing off this policy and would cease to use secret comparables. The CCRA hotly denied that suggestion and indicated that the matter was currently being studied. To date, however, it is understood that that study is, if not put on hold, then at least proceeding very slowly and is unlikely to be finished anytime soon.

THE CCRA’S RIGHT TO RELY ON SECRET COMPARABLES: CONTRASTING THE CRESTBROOK AND PROMEX CASES

It is clear from IC 87-2R that the CCRA believes that it has the legal right to use secret comparables gleaned from one taxpayer to assess an unconnected taxpayer. Is this correct? In Crestbrook Forest Industries Ltd. v. The Queen, Revenue Canada (as the CCRA was formerly named) collected information from a number of pulp and newsprint exporters, which gave the information on a voluntary basis. Revenue Canada told the exporters that the information was going to be used in connection with discussions between Revenue Canada and the IRS regarding “safe haven” rules for the pulp and newsprint industry. Specifically, in the survey request, the following appeared:

PURPOSE OF SURVEY
The purpose of the survey is to determine a reasonable range of arm’s length sales discounts and commissions applicable to wood pulp and newsprint export prices.
USE OF SURVEY
The survey will provide the basis for bilateral discussions between Revenue Canada and the Internal Revenue Service, and possibly other foreign tax authorities relating to the development of a set of “safe haven” rules applicable to wood pulp and newsprint non-arm’s length export price discounts and agency commissions.

Having received the survey results from Crestbrook’s fellow forest companies, Revenue Canada then sought to use this information as a basis for a reassessment against Crestbrook. Revenue Canada sought to show, on the basis of the information in the survey, that Crestbrook’s discounts to its customers on pulp sales were too high. On discovery under the Federal Court rules, Crestbrook sought production of the survey.

The Federal Court Trial Division ordered production, subject to certain confidentiality undertakings to be given by Crestbrook. The simple basis for the order of production was that, with the onus of proof lying on the taxpayer and with that onus being difficult to meet without production, the rules of discovery requiring production overcame any promise of confidentiality given by the Crown to the participants in the survey.

The Federal Court of Appeal, however, took an entirely different view of things. It held that, having given the promise of confidentiality, Revenue Canada could not violate that promise by using the survey as the basis for an assessment. Therefore, the taxpayer’s application for production had to be dismissed, but only because Revenue Canada’s ability to use the survey as the basis for the assessment was eliminated:

In our view, where the Crown has obtained information in confidence from taxpayers on a voluntary basis and for a specific 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.40

While this holding did not entirely invalidate the assessment or undermine the minister’s assumptions pleaded in the statement of defence, a large part of the Crown’s case was obviously wiped out. In many cases, the inability to use any secret comparable may entirely undermine the basis for the assessment. Accordingly, while this case is sometimes viewed as a defeat for taxpayers,41 in my view it is anything but. The obvious strategy in similar circumstances would be to apply for a declaration that the CCRA is prohibited from using a secret comparable as the basis for a proposed assessment.

Crestbrook was distinguished in Promex.42 In an unusual situation, the taxpayer had been involved in a civil lawsuit and the Ontario court in the suit had ordered the Ontario court registry file to be kept sealed and confidential. Notwithstanding this restriction, Revenue Canada, in a subsequent audit of the taxpayer, simply asked for and received the file, the court clerk apparently paying no attention to the sealing order. The taxpayer, relying in part on Crestbrook, argued that Revenue Canada
could not reply on the information because it was confidential. The court did not agree. According to the court, *Crestbrook* was not applicable because in that case Revenue Canada obtained the information in confidence from third parties, whereas in this case “[t]he Minister did not obtain the information in confidence. He obtained it, it seems, simply by asking for it.”

It is suggested that this is not a valid basis on which to distinguish *Crestbrook*. The auditor asked for information that was by court order sealed and confidential. Whether the auditor knew of that order seems to me to be irrelevant. The important point is that the information was in fact sealed and confidential as against the whole world, including Revenue Canada/the CCRA. How can the CCRA be in a better position by obtaining documents through the (let us suppose) unintentional violation of a confidentiality order than the position it would have been in had an informant voluntarily given that information to the CCRA in confidence? Such a decision merely encourages the CCRA to ask for documents it should not be entitled to receive.

In any event, one may suppose that in most cases the CCRA will receive secret comparables as a result of information-gathering techniques that imbue the information with either an express or an implied undertaking of confidentiality, thus making *Crestbrook* applicable. It is assumed that the vast majority of data obtained by the CCRA are obtained through normal information-gathering techniques such as tax and information returns and audits. Are such data subject to the rule in *Crestbrook* that information gathered with a promise of confidentiality may not be used for some other purpose? This issue may be stated as follows: is information disclosed to the CCRA as a result of a normal audit or as a result of a normal tax or information filing received by the CCRA with an implied undertaking of confidentiality? Several immediate objections to this proposal are that (1) the information is required by law to be supplied to the CCRA, so that the normal relationship that could give rise to a duty of confidence does not arise; (2) the taxpayer supplying the information would be aware or be deemed to be aware of paragraphs 241(3)(b) and (4)(a) and (b) of the Act, thus reducing any expectation of implied confidence; and (3) the information is supplied in a purely regulatory context, thus reducing any expectation of confidence. On the other hand, it has been held that information can be confidential even though it was supplied under a legal requirement to do so. The court held that information would be “confidential” for purposes of section 20 of the Access to Information Act if and only if it met the following criteria:

My review of the authorities, facilitated in part by submissions of counsel, is undertaken in order to construe the term “confidential information” as used in s. 20(1)(b) in a manner consistent with the purposes of the Act in a case where the records in question under control of a government department consist of documents originating in the department and outside the department. This review leads me to consider the following as an elaboration of the formulation by Jerome A.C.J., in *Montana*, supra, that whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:
a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication [emphasis added].

It follows, in my view, that although there are certainly arguments as to why normally obtained data would not fall under the *Crestbrook* rule, the argument that such data are subject to the rule in *Crestbrook* cannot be ruled out. It seems self-evident that most taxpayers supply the CCRA with information in the expectation that it will be kept confidential; and in fact the CCRA makes this express promise to taxpayers at large. This issue therefore remains open for determination by a court.

**OBTAINING DISCLOSURE**

Assuming that the CCRA does have the right to use secret comparables to form at least part of the basis for an assessment, must the CCRA disclose those comparables to the assessed taxpayer? The taxpayer may attempt to get such information in three ways: through the Appeals Renewal Initiative (ARI), the Access to Information Act, and the pre-trial discovery process.

**The Appeals Renewal Initiative**

When a notice of objection is filed, the minister is obliged to review it and either confirm, vacate, or modify the assessment. The appeals officer assigned to this task will review the entire audit file (to the extent that the material therein is relevant to the issues objected to), review the notice of objection, review any further submissions filed by the taxpayer, and make a recommendation. From time to time, the appeals officer may discuss the file with the auditor who issued the assessment to clarify certain matters or with others in the CCRA to obtain their views on the issues. The appeals officer in a transfer-pricing dispute will naturally review any valuation report prepared by or for the CCRA, including any secret comparables referred to therein.

On April 17, 1997, the CCRA released the ARI. Appendix A thereto, a protocol entered into between the Audit and Appeals branches of the CCRA, states that the auditor will make available to the appeals officer “all documents supporting the assessment.” The CCRA has agreed that normally a taxpayer will be given, on request, a copy of the T20 report, T2020 notes, and working papers, valuation reports, etc., after the assessment is issued and before the objection is filed, so that the taxpayer can draft the notice of objection with an eye to the real issues in dispute.
The ARI states that the appeals officer will “make available [to the taxpayer] all relevant documents supporting the issues under dispute.” No exceptions are listed for third-party information. Nevertheless, it is clear in practice that the CCRA would refuse to disclose such information pursuant to subsection 241(1) of the Act, which deems all “taxpayer information” to be confidential.\(^\text{58}\)

The Appeals Branch’s commitment to releasing all relevant information has been confirmed twice since the release of the ARI.\(^\text{59}\) In a discussion paper entitled *Ensuring Fair Customs and Revenue Administration in Canada*, released by the minister on March 18, 1998,\(^\text{60}\) the CCRA states, “We will inform you about your rights and obligations, *and ensure you have the information to realize them* [emphasis added].” The paper also states:

> We have an Appeals Branch headed by an assistant deputy minister.  
> When you ask for a review . . . you have the right to review documents related to your case.

Again, note that there is no exception stated for secret comparables.

The second confirmation of the ARI is in the CCRA’s Leaflet RC4168 1772, “Resolving Your Dispute: A More Open, Transparent Process (for Income Tax and GST/HST Objections),” November 17, 1999. The leaflet lists materials to which a taxpayer is or is not entitled (at least in the CCRA’s view) at the objection stage. The list of inclusions includes

- Reports prepared by an auditor to support your assessment.
- Working papers prepared by an auditor that are relevant to the issues in your dispute.
- Scientific, appraisal, and valuation reports relied on by an auditor to determine your assessment.
- Information obtained from a third party with whom you are doing business, such as sales invoices, purchase orders, cancelled cheques, etc.

On the other hand, the list of exclusions includes

- Personal information relating to another person.\(^\text{61}\)
- Information from a third party obtained on the expectation that the information would remain confidential.\(^\text{62}\)
- Documentation related to an on-going investigation.\(^\text{63}\)

While none of these documents released by the CCRA are legally binding on it, they do indicate that the Appeals Branch recognizes the impossibility of a taxpayer’s objecting to an assessment without a full grasp of all information relied on by the auditor to issue the assessment. This self-evident truth is the legislative policy behind paragraphs 241(3)(b) and (4)(a) and (b) of the Act and should be used to interpret those provisions as widely as necessary to ensure that taxpayers are not left fighting unknown information.
At a Revenue Canada round table held in December 1997, the CCRA addressed some issues under the ARI. In its response to question 22, the CCRA stated that its commitment to releasing all relevant documents was “subject to disclosure limitations of a client/solicitor nature, sections 241 of the Income Tax Act and 295 of the Excise Act as well as the Access to Information and Privacy Act.” However, this response begs the question, because, as argued below, there should be no limitation under section 241 to the disclosure of secret comparables on which an auditor has relied to assess a taxpayer. The bottom line is that at this time, taxpayers are unlikely to obtain disclosure of secret comparables under the ARI.

The Access to Information Act

In most tax litigation of any significance, the taxpayer will make an application under the Access to Information Act (“the Access Act”) for copies of all documents in the CCRA’s possession relevant to the litigation.

There appears to be no decided case where an Access Act request has been made for secret comparables. Under the basic policy of that Act, such information should be disclosed. The purpose of the Access Act is specifically set out in section 2(1) of that statute as follows:

The purpose of this Act is to extend the present laws of Canada 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.

However, the general right of access to information is subject to certain exemptions. For example, section 19(1) of the Access Act states that the head of a government institution may refuse to disclose information where such information constitutes “personal information” as defined in section 3 of the Privacy Act; and section 20 of the Access Act states that the minister must not release

(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

The Supreme Court of Canada considered the interplay between the broad right of access to information under the Access Act and a specific exemption in that
Act in *Dagg v. Canada (Min. of Finance)*. The appellant sought access to certain sign-in logs that contained information regarding employees of the Department of Finance who worked on weekends. The minister of finance disclosed the logs after deleting the employees’ names, identification numbers, and signatures on the basis that the information constituted “personal information,” which was exempt from disclosure under section 3(j) of the Privacy Act. The appellant appealed to the Supreme Court for complete disclosure of the sign-in logs. Although the majority ruled in favour of the appellant, it agreed with the approach of Mr. Justice La Forest, who rendered the dissenting judgment, in his interpretation of the interaction between the Access Act and the Privacy Act.

The court stated that the main purpose of the Access Act is to provide access to information under the control of a government so that the public will have the necessary information required to participate meaningfully in the democratic process and to hold politicians accountable. Accordingly, any exemption to the general right of access to government-held information should be considered in light of the overarching purpose of the Access Act. On the other hand, the main purpose of the Privacy Act is to protect the privacy of individuals with respect to personal information about themselves held by the government and to provide individuals with a right of access to that information. The two pieces of legislation are complementary, said the court, and neither should take precedence over the other.

*Dagg* dealt with the exemption from disclosure under section 19(1) of the Access Act described above. The court stated that the determination of whether a record constitutes “personal information” is an interpretive exercise. In making that determination, the first issue is whether the information in question, recorded in any form, relates to an identifiable individual, as set out in the opening wording of section 3. Once it is determined that information constitutes “personal information,” the second issue is whether such personal information is exempt from disclosure. While the majority agreed with the dissenter that the sign-in logs constituted personal information, they differed in their opinion whether such personal information was exempt under section 3(j). While Mr. Justice La Forest was of the view that the information contained in the sign-in logs did not constitute information about the nature of a particular position, Mr. Justice Cory for the majority was of the view that the number of hours spent at the workplace as recorded in the sign-in logs related to the position or function of the individual; thus, the contents of the sign-in logs should fall under the exemption to the definition of “personal information” in section 3(j). Accordingly, the court held that contents of the sign-in logs should be disclosed to the appellant.

Although the exemption to disclosure contained in section 20 of the Access Act will more likely be used by the CCRA to deny access to information to a taxpayer than section 19(1), any exemption to disclosure of information will be given a strict reading in light of the general right of access to information as set out in section 2(1) of the Access Act and explained in *Dagg*.

At first glance, it appears that section 20(1) of the Access Act would prevent taxpayers from accessing secret comparables in most cases. Note, however, that
section 20(1)(b) applies only to information supplied to the Crown, not information taken by the Crown. Therefore, where the Crown is simply in possession of information that has not been supplied to it by the third party (as in Promex, for example), section 20 may not apply.

Furthermore, the onus is on the party resisting disclosure to show why section 20 applies, using an objective basis. Therefore, it may be worthwhile to make an application under the Access Act since the resisting party may not be able to meet its onus.

Note also that the name of the third party in and of itself is not exempt under section 20, although it may be under some other section of the Access Act.

In general, however, it is likely that secret comparables fall under section 20, and hence the Access Act has little role to play in forcing the CCRA to disclose such comparables.

The Pre-Trial Discovery Process

How Relevant Are Secret Comparables?

If an assessment is confirmed by the minister under subsection 165(3), the taxpayer may file a notice of appeal in the Tax Court of Canada. Under the TCC rules, the Crown must file a list of all documents relating to the matters in issue on which it intends to rely and may not introduce any document at trial that is not on its list. The parties may agree, or the court on the application of either party may order, that each party file an affidavit listing not only the documents in support of that party’s case but all documents (even if such documents are not in support of that party’s case) in that party’s possession that relate to the matters in issue. In addition, the taxpayer has the right to examine a representative of the Crown on all matters relating to the issue.

Assuming that the CCRA has relied on secret comparables to form the basis of an assessment, such comparables would normally “relate” to the matters at issue and therefore would have to be disclosed at an examination for discovery or on an affidavit of documents. In In re MNR v. Huron Steel Fabricators (London) Ltd. and Fratschko, the Federal Court of Appeal ordered the Department of National Revenue to release taxpayer information of a defunct company to Huron Steel where the latter’s reassessment was based on information contained in the defunct company’s tax returns. Huron was applied in AMP of Canada, Ltd. v. The Queen to permit AMP to obtain financial information about its competitors on which the Department of National Revenue relied in assessing AMP.

More recently, this point was illustrated in the Australian case San Remo Macaroni Company Pty Ltd. v. FC of T. The taxpayer applied for an order forcing the commissioner to disclose secret comparables the commissioner had relied on in assessing the taxpayer. The taxpayer’s allegation was that the commissioner had acted in bad faith and therefore the assessment was invalid. The commissioner resisted on the ground that the taxpayer was on a fishing expedition. The court ordered production. The court held that the mere complaint of a “fishing” expedition would not be sufficient to resist disclosure:
I have in other cases had cause to lament cases being argued on a basis put as vaguely as “fishing.” It is a metaphorical expression and, as such, is capable of being understood in different ways by different people. I refer to the judgment of a Full Court of this Court in Treasurer of the Commonwealth of Australia v. CanWest Global Communications Corporation (30 June 1997, unreported) for a discussion of that issue. As the Full Court pointed out in proceedings brought under s 39B of the Judiciary Act discovery orders are available in such proceedings but, more importantly, in the late 20th century, courts have been more ready to permit doubtful plaintiffs to penetrate what the judgment refers to as “the obscurities of a dark pool.” Or, as another Full Court said in Caltex Refining Co. Pty Ltd. v. The Amalgamated Metal Workers Union (6 December 1990, unreported), in a judgment delivered by Burchett J with the agreement of Lockhart and Gummow JJ:

“This objection [ie the ‘fishing’ objection] to applications for discovery of documents does not now have the weight it was once thought to have. Perhaps it should be seen as a metaphor with more colour than substance.”

The court made it clear that it was not ordering production merely because the taxpayer had requested it; in the court’s view, the documents were potentially relevant to the issues as pleaded and therefore discovery was warranted:

Ordinarily the question of discovery and whether it is appropriate is a matter that will be determined by reference to the proceedings as pleaded or particularized. Paraphrasing what was said by the Full Court in CanWest but, by reference to the present circumstances, the pleadings, that is to say the “Grounds of Application and Particulars” raise an issue for decision to which the Commissioner’s documents may be relevant. There is no suggestion of abuse of process. The “Grounds of Application and Particulars” raise issues which can only be resolved if the Court has before it the material upon which the determination was ultimately based.

On the other hand, it has been held that the fact that the CCRA has in its possession information that might assist the taxpayer in establishing an arm’s-length transfer price but that was not relevant to the pleadings does not make that information subject to discovery. In Smithkline No. 3, the court said:

The rates of return of other pharmaceutical companies are not relevant to any issues raised by the pleadings. The central issue, as I have already noted, is whether the price paid or payable by the Appellant was greater than that which would have been reasonable in the circumstances if the Appellant and the Affiliated companies had been dealing with each other at arm’s length. It is the circumstances surrounding the supply of cimetidine to the Appellant which are relevant under subsection 69(2) of the Act. There is nothing in the materials to suggest that a factual or logical linkage exists between the price that would have been paid if the Appellant had dealt with the Affiliated companies at arm’s length and the rate of return of other Canadian pharmaceutical companies.

The court specifically held that the fact that such information might be “taxpayer information” and hence confidential under subsection 241(1) would not prevent
its disclosure in discovery if it were otherwise relevant, but noted that the claim of relevance should be viewed carefully given that the third-party information would normally be confidential:

Submissions were made with respect to the confidentiality of the information in the files of the CCRA regarding the profitability and rates of return of other taxpayers. Relevance is the threshold issue when questions arise regarding the ambit of discovery and, in my opinion, it is plainly lacking in respect of the paragraph 14(c) and (d) questions and the second part of the 14(b) question. Although the questions asked are by any standard irrelevant, I will add that in my opinion a particularly clear demonstration of relevance is required where a taxpayer asks a Revenue official on discovery for information which a competitor has furnished to Revenue in accordance with the requirements of the *Income Tax Act*. The Court must be alert to the possibility that such an inquiry is an attempt to take advantage of the fact that the protection afforded to taxpayer information by section 241 of the *Income Tax Act* is limited by subsection (3).83

It is critical to note that the court in *Smithkline No. 3* did not say that the third-party information was not relevant because it had not been relied on by the CCRA in assessing the taxpayer, but merely that it was not relevant to the pleadings. If the court had said the former, it would have, in my view, been clearly wrong in light of the wording of the applicable TCC rules and the *Owen Holdings* and *Smithkline No. 1* cases.84 The TCC rules state that all documents and information relating to the matters in issue must be disclosed; there is no exception for material that was not relied on by the disclosing party.85 In *Owen Holdings*, the court forced the CCRA to disclose technical interpretations not relied on by it in assessing the taxpayer. In *Smithkline No. 1*, the court forced the taxpayer to disclose an expert's report prepared for different litigation that had not been relied on by the taxpayer in challenging the assessment. In my view, had the taxpayer in *Smithkline No. 3* pleaded that its prices were arm’s-length prices as compared with the prices of similar, unconnected taxpayers, it would have had a much stronger case for forcing the Crown to disclose any third-party information in the Crown’s possession relevant to the determination of Smithkline’s correct transfer price, whether or not the minister had relied on that information in assessing Smithkline. Any other conclusion would mean that it is practically impossible86 for a taxpayer to prove that its prices are arm’s length as required by the CUP method.

**How Relevant Is Section 241?**

Apart from the argument that secret comparables are irrelevant to a transfer-pricing case, the Crown almost always argues that it is prohibited from disclosing such information under section 241. This argument requires an analysis of the general confidentiality rule in section 241 and the exceptions to it.

Subsection 241(1) states that all “taxpayer information”87 is confidential, and subsection 241(2) prohibits anyone from ordering the CCRA to disclose such information in any legal proceeding:
241(1) Except as authorized by this section, no official shall

(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
(c) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act* or for the purpose for which it was provided under this section.

(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.

On the surface, it appears from subsection 241(2) that, regardless of relevance, secret comparables are not subject to pre-trial disclosure. However, there are four other provisions that must be taken into account: paragraphs 241(3)(b) and 241(4)(a), (b), and (k):

(3) Subsections (1) and (2) do not apply in respect of . . .

(b) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment 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 . . . .

(4) An official may

(a) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, the *Canada Pension Plan*, the *Unemployment Insurance Act* or the *Employment Insurance Act*, solely for that purpose;
(b) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of 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; . . . .
(k) 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.

It can be seen that despite the general rule of confidentiality and non-disclosure in legal proceedings, taxpayer information is not confidential and may be disclosed by the CCRA (1) in legal proceedings relating to the administration and enforcement of the Act; (2) where it may reasonably be regarded as necessary for the administration and enforcement of the Act; (3) where it may reasonably be regarded as necessary to determine the tax payable by any person; or (4) where the person receiving the information is otherwise legally entitled to it.
It is clear that under these exceptions the CCRA cannot object to disclosure of secret comparables in pre-trial discovery. Even though tax appeals are initiated by the taxpayer and not by the minister under section 169, such appeals are for the purpose and enforcement of the Act within the meaning of paragraph 241(3)(b). It is also clear that if the secret comparables relate to any matter in issue in the appeal, it may reasonably be regarded as necessary for the correct determination of the assessed taxpayer’s tax payable (paragraph 241(4)(b)), which in turn means it may reasonably be regarded as necessary for the administration and enforcement of the Act by the court hearing the appeal (paragraph 241(4)(a)). Lastly, since the Tax Court of Canada Act gives the court the right to hear and determine tax appeals and to make rules for the conduct of such appeals, it is clear that the assessed taxpayer would be a person legally entitled to receive the information under an Act of Parliament (paragraph 241(4)(k)).

**May the CCRA Rely on “May”?**

Subsection 241(4) begins with the words “An official may.” Does this give the CCRA a discretion not to release the information if it otherwise meets the tests in paragraph 241(4)(a), (b), or (k)? The word “may” is usually said to be permissive and discretionary in nature. Section 11 of the Interpretation Act specifies that “may” is permissive, but by section 10 of that Act, this interpretation is subject to a contrary intent expressed by the context of the provision in which “may” appears.

In my view, in the context of these paragraphs, “may” either means “shall” or is empowering rather than permissive. As to the former, in *Julius v. Lord Bishop of Oxford*, the court said:

[W]here a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

*Julius* was applied in *Labour Relations Board v. The Queen on rel. of F.W. Woolworth Co. Ltd. et al.*, where the court said:

While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application (*Drysdale v. Dominion Coal Company*: Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right [emphasis added].

In my view, these words apply to paragraphs 241(4)(a) and (b). The assessed taxpayer has a legal right to pre-trial disclosure of any information relating to the matters in issue. These paragraphs should not be interpreted as giving the CCRA a discretion as to whether to release such information.
As to “may” being empowering rather than conferring a discretion, see *R v. IRC, ex p Newfields Developments*. The court had to construe the word “may” in a taxing statute. The Inland Revenue argued that it conferred a discretion. But the court said it was merely empowering:

[20] But the word appears in an impersonal construction—“there may also be attributed”—and I think that its force is not facultative but conditional, as in “VAT may be chargeable.” The question of whether VAT is chargeable does not depend upon anyone’s choice but on whether the conditions for charging VAT are satisfied: are the goods or services subject to VAT, is the trader registrable and so on. . . .

[22] Although the point may be merely verbal, I do not think that it is right to say, as the parties appear to have done before Moses J, that “may” confers a “power.” It is true that there are powers which in certain circumstances must be exercised. But I think it is clearer, having regard to the impersonal use of “may” in the subsection, to say that it expresses conditionality. . . .

[43] This, in my opinion, explains the use of the word “may” in subsection (6). The use of the word “may” does not lead to the conclusion that the subsection creates a discretionary power. The absence of any indication of the criteria by which the discretion is to be exercised or any identification of the person by whom the discretion is to be exercised seems to me to make that plain.

Similarly, paragraphs 241(4)(a) and (b) do not contain any indication of the criteria by which the putative discretion is to be exercised. In my view, therefore, “may” in this context is not discretionary but merely empowers the CCRA to disclose the information where it is otherwise required to do so.

**May the CCRA Rely on Section 37 of the Canada Evidence Act?**

If the CCRA is required to disclose a secret comparable under the combination of paragraphs 241(3)(b), 4(a), (b), and (k) and the TCC rules, may the CCRA rely on section 37 of the Canada Evidence Act to keep it secret? That section states:

37(1) A minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

(3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by
Section 37 is in part a codification and in part a procedurally related modification of the common law rule known as public interest privilege. It is part of an ascending order of privileges expressed in sections 37 to 39 of the Canada Evidence Act, which starts with privileges that may or may not be applied in any case, and concludes with privileges that must be applied in every case. The common law rule codified in section 37 provides that in certain cases a court will be required to exclude information where the public interest in exclusion outweighs a private interest in disclosure. The categories of public interest that may be damaged by disclosure are not closed. The modification expressed by section 37 to the common law rule is that a court may examine the information in the course of deciding whether to apply the privilege; in that sense, section 37 is merely a procedural rule that does not expand or contract the essence of the common law rule. The courts have identified several broad categories of interest that may fall under section 37. However, while information relayed to a government (such as the CCRA) is one of these categories, it appears that this cannot apply in the case of a secret comparable used to support a proposed tax assessment against another taxpayer. This is because section 241 of the Act constitutes a complete code outlining the circumstances under which information is or is not to be kept confidential:
[S.] 241 provides further support for the conclusion that although Parliament has recognized the importance of preserving the taxpayer’s right to confidentiality, Parliament has also recognized the need for administering the Act in an efficient manner. To this end, complete procedural guidelines have been provided in the Act for determining when and to what extent documentation should remain confidential, and rights of appeal have been specifically provided in appropriate cases.108

Furthermore, it is notable that even in cases where public interest privilege has been successfully claimed on the basis of the need to encourage candour among third parties, the government has been required to provide summaries of the secret information.109 In the tax context, this would require the CCRA to at least provide summaries of the secret comparables used to assess the taxpayer.

Lastly, it has been held that section 37 of the Canada Evidence Act would not prevent the disclosure of documents such as income tax returns of third parties relied on by the CCRA to assess a taxpayer where those documents are required to be filed by the third parties on a true and plain disclosure basis, the idea being that as the third parties are required to file the documents truthfully in any event, the usual argument that confidentiality is needed to promote candour does not apply. See Huron Steel, where the court said:

The onus which the income tax law places on a taxpayer to demolish the assumed facts upon which the taxation rests is not so easily discharged in most cases as to permit counsel or anyone else lightly to assume or to accept that nothing is to be found in the documents upon which an assessment is based that will either aid the establishment of the taxpayer’s case or help to destroy the Minister’s assumptions and when, as here, the Minister’s assumptions have admittedly been based on the returns in question it seems to me to be manifest both that the need of the respondents for production of these returns is made out, an impression which to my mind is reinforced by my examination of the returns, and that a very strong public interest in keeping them from production would be required to outweigh the public interest in the proper administration of justice which would be served by their production.110

In my view, section 37 is not a bar to a taxpayer’s right to have pre-trial discovery of secret comparables that are otherwise relevant and not protected by section 241.111

May the CCRA Rely on the So-Called Informant’s Privilege?
Assuming that a secret comparable relates to a matter in issue in a particular taxpayer’s appeal and that the CCRA is required to disclose it pursuant to the exceptions in section 241, another issue is whether the so-called informant’s privilege may shield the information from discovery.

In Promex,112 an issue arose as to whether the identity of a CCRA informant had to be disclosed to a taxpayer during discovery. The court said that the so-called informant’s privilege outweighed the TCC rules requiring disclosure of all evidence relating to the matters in issue. The court summarized its understanding of the privilege in eight points:
(1) The rule is one of great antiquity. It was recognized as early as 1794 and has frequently been followed in Canada and in England in this and the last century.

(2) It is a rule of law based on public policy and is not a matter of discretion.

(3) Its application is not restricted to criminal prosecutions. It is applicable in all civil proceedings.

(4) It is not confined to informants who disclose information to the police. It applies to informants who supply information to other public authorities (provided, of course that the conditions mentioned in Wigmore and adopted by Spence, J. in Slavutych (supra) are met).

(5) The application of the rule is not subject to any formal requirement. If no one raises it the court must apply it of its own motion.

(6) It is subject to only one exception, imposed by the need to prove an accused’s innocence in a criminal proceeding. There are no other exceptions.

(7) The Crown cannot waive the privilege, although the informant can.

(8) One must be careful not to confuse the secrecy rule regarding police informers with Crown privilege. At page 94 of the judgment of Beetz, J. he paraphrases Martland, J.’s observation to the effect that:

\[\ldots\text{the privilege in question is not given to the informer, and the latter’s misconduct therefore does not destroy the privilege: the privilege is that of the Crown, which is in receipt of information under an assurance of secrecy.}\]^{113}

The court held that the privilege outweighed the Crown’s obligation to make full discovery. With respect, I disagree. The TCC rules are regulations and, unless held to be ultra vires, are legislatively binding. The TCC rules governing discovery do not allow for informant’s privilege but do allow for solicitor-client privilege. There is no basis for reading into the TCC rules a common law exception. On this subject, a discussion of Glaxo Wellcome PLC\textsuperscript{114} is appropriate.

Glaxo is one of the world’s largest drug companies. It held two Canadian patents for certain drugs. Its policy was to review on a regular basis reports from Statistics Canada to see if these patented drugs were being imported into Canada. It discovered from these reports that about 73,000 kilograms of the two drugs had been imported into Canada over and above the amount Glaxo expected to be imported. The reports did not disclose the names of the importers. Glaxo applied to the minister under the Access Act for the names of the importers. Glaxo applied to the minister under section 108 of the Customs Act.\textsuperscript{115} Together with section 107, these provisions provide that third-party information is confidential but may be released under certain conditions:\textsuperscript{116}

107(1) Except as authorized by section 108, no official or authorized person shall

(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 the Customs Tariff or by an authorized person for the purpose of carrying out an agreement made under subsection 147.1(3);

(b) knowingly allow any person to inspect or to have access to any book, record, writing or other document obtained by or on behalf of the Minister for
the purposes of this Act or the *Customs Tariff* or by an authorized person for the purpose of carrying out an agreement made under subsection 147.1(3); or

(c) knowingly use, other than in the course of the duties of the official or authorized person in connection with the administration or enforcement of this Act or the *Customs Tariff*, any information obtained by or on behalf of the Minister for the purposes of this Act or the *Customs Tariff* or by an authorized person for the purpose of carrying out an agreement made under subsection 147.1(3).

(2) An officer may, on the order or subpoena of a court of record,

(a) give evidence relating to information obtained by or on behalf of the Min-
ister for the purposes of this Act or the *Customs Tariff*; or

(b) produce any book, record, writing or other document obtained by or on behalf of the Minister for the purposes of this Act or the *Customs Tariff*.

(3) An officer may show any book, record, writing or other document obtained for the purposes of this Act or the *Customs Tariff*, or permit a copy thereof to be given, to the person by or on behalf of whom the book, record, writing or other document was provided, or to any person authorized to transact business under this Act or the *Customs Tariff* as that person’s agent, at the request of any such person and on receipt of such fee, if any, as is prescribed.

The minister refused the section 108 application on the ground that the information was confidential and there was no valid reason to release it.

Glaxo then applied for judicial review of the minister’s refusal. Separate and apart from that application, Glaxo applied to discover the minister under an ancient rule known as the equitable bill of discovery for the names of the importers.

Both applications were heard at the same time. The Court of Appeal dismissed the application for judicial review but allowed the application for discovery. The reasoning on both applications is germane to this article.

On the application for judicial review, the court noted that the power to disclose under paragraph 108(1)(b) was discretionary. Consequently, said the court, the minister’s decision not to disclose could be overturned only if it was not exercised in good faith or in accordance with the principles of natural justice, or if it took into account irrelevant facts or failed to take into account relevant facts, or if the minister fettered his discretion. On this last point, Glaxo had argued that the minister had stuck too closely to his published position on when disclosure would be made and failed to take into account the particular circumstances of the case, but the court held otherwise on the evidence.

On the application for discovery, the court held that the purpose of such an application is to allow an injured person the right to discover the name of the wrongdoer. The court held that the bill would be granted whenever a person seeks to discover a person (1) who is not a party to the action, (2) against whom the applicant has no cause of action, (3) who is not a mere witness or bystander, but (4) who is in some way connected to or involved in the misconduct that is the intended subject of the discovery. Lastly, the person sought to be discovered must be the only practical
(not necessarily the only possible) means of getting the information. Glaxo argued that the minister fulfilled these conditions.

The court agreed. It held that section 108 was not a complete code of the methods by which disclosure by the minister could be ordered, so that equity still had room to manoeuvre. It also held that the fact that Glaxo had not pursued an appeal under the Access Act was irrelevant because the outcome of such an appeal would have been the same as the outcome on judicial review.

The court held that it was appropriate to order the minister to disclose the names of the importers because the names themselves did not constitute commercially sensitive information, and moreover such persons were likely to be wrongdoers in the sense that they were likely to have been importing Glaxo’s drugs without paying the applicable licence fee. Furthermore, the court noted that because of section 108 the importers likely had little expectation that their names would in all circumstances be held in confidence by the minister.

Lastly, the court held that although at common law the Crown is immune from discovery, the bill sought in this case was one of equity and equity trumps the common law.

Several points about this case are relevant to whether the CCRA can be forced to disclose secret comparables. First, the existence of paragraphs 241(3)(b) and 241(4)(b) mean that third parties should have low expectations that any such comparables will remain confidential within the CCRA. Second, if the Crown’s longstanding common law immunity from discovery can be overridden by the equitable bill of discovery, a fortiori a regulation such as a TCC rule permitting discovery trumps the common law privilege against disclosing the names of informers.118 Third, although the Tax Court is not a court of equity and cannot grant an equitable bill of discovery, the fact that one appeals to the Tax Court does not stop the taxpayer from applying to the Federal Court for such a bill.

Another point about Promex is that paragraph 241(3)(b), which clearly applies to a matter before the Tax Court, is a statutory provision that admits of no common law exception.119 It is one thing to say, as the court in Promex did, that the informer’s identity is irrelevant.120 It is another to say that the CCRA can keep relevant information secret. Furthermore, if, as the CCRA argued, the information was obtained under a promise of confidentiality, it is not clear why Crestbrook would not preclude the CCRA from relying on the information to assess Promex.

Finally, in R v. Peddle,121 the court discussed one of the four exceptions to the informant’s privilege rule, namely, that it does not apply where the informant is a material witness.122 The court considered whether this meant any material witness or whether it meant a material witness to the crime. The court indicated that in its view it meant the latter, although it was not definitive that this should be so:

It seems apparent, however, that the “material witness” Justice Cory had in mind in Scott, justifying a disclosure of an informer’s identity, was an individual who had personal knowledge of the commission of the offence and possessed essential information needed to demonstrate the innocence of the accused. An attempt at a more
precise definition may not be beneficial, and probably best left for refinement on the issues and facts of each case.123

Can this exception be extended to civil cases? There is no judicial authority to that effect. However, given that the Supreme Court has expressly limited the “innocent accused” exception to criminal trials124 but has not done the same with the material witness exception, one can argue that the latter can apply in civil cases. In particular, it should apply where the identity of the informant is necessarily relevant to evaluating the true usefulness or otherwise of a secret comparable. Thus, for example, where a comparable is the profit margin achieved by a particular company similar to the taxpayer that has been assessed, the company is a material witness in the sense that only that company can testify as to the facts that allowed it to achieve that profit margin and as to whether the taxpayer’s facts are sufficiently distinct as to show that the said profit margin is not a true comparable.

**THE ONUS OF PROOF**

Earlier articles125 have discussed when the onus of proof could be reversed if the CCRA were in possession of facts unknown to the taxpayer. Although to date there has been no case that in fact has so reversed the onus, the theory does not appear to have been questioned. Where the CCRA has relied on secret comparables to assess a taxpayer, obviously those comparables will be unknown to the taxpayer and uniquely in the knowledge of the CCRA. Any assumption as to the true transfer price in these circumstances should be subject to an application for a declaration that the onus of proof in respect of that assumption should be on the Crown.

**PROCEDURAL MATTERS**

In addition to the substantive rules on confidentiality in section 241, that section also sets out certain procedural rules. Subsection 241(6) provides that where an order has been made by a lower court for the disclosure of taxpayer information and the respondent to that order wants to appeal, the respondent may appeal either to the highest provincial court of appeal if the order was made in a provincial court or tribunal or to the Federal Court of Appeal otherwise. By subsection 241(7), the appeal court may quash the order or dismiss the appeal,126 and the procedural rules for normal appeals apply to subsection 241(6) appeals mutatis mutandis. In contrast to ordinary appeals, where the order appealed from is not stayed merely because it is being appealed, by subsection 241(8) the mere filing of the appeal stays the order until the appeal court gives its decision.

Subsection 241(6) makes it a condition of appealing that notice of the appeal be served on “all interested parties.”127 This means that if the Crown is appealing an order to disclose a third party’s information, the Crown must notify that party of the appeal. The reason for this is that the third party may not care about the order and thus may consent to disclosure, making the appeal moot.128 It is notable that the scheme of section 241 shows how Parliament balanced the three competing
policy interests discussed above. First, the information is to be kept confidential, but the CCRA may still use the information to assess an unconnected taxpayer. Next, the assessed taxpayer may have access to the third-party information if it is relevant to the taxpayer’s tax appeal. Only lastly must the third party be notified of the proceedings and even then only on an appeal of the original order. Thus, the Act puts the CCRA’s interests first, the assessed taxpayer’s second, and the third party’s last, exactly the opposite of what in my view should be the correct ordering of the competing policy interests.

CONCLUSION
The CCRA should stop using secret comparables. But if the CCRA is going to use them, it must disclose them to the assessed taxpayer as well as all related information. It is fundamentally unfair to tell a taxpayer, “We know your prices are wrong but we won’t tell you why and you have the onus of proving they’re not.” Not only is such a position unfair, but the CCRA’s policy as set out in IC 87-2R on the disclosure of secret comparables is not in accordance with the Act.

NOTES
1 www.tax.org/quotes/quotations.htm.
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 In my view, it is highly probable that this portion of section 247 violates Canada’s obligations under article 9 of its various income tax treaties, in that those articles permit Canada to adjust the amounts charged between non-arm’s-length parties but not the form of the transaction.
5 See John R. Brodie and Gord Denusik, “Transfer Pricing—Current Issues,” in 2000 British Columbia Tax Conference (Toronto: Canadian Tax Foundation, 2000), tab 13, 5: “Comparability of a transaction is dependent upon the type of product or service, contractual terms, level of the market, geography, inclusion of intangibles and other factors. The comparable uncontrolled price (‘CUP’) method is always the starting point for any analysis. This method . . . is the CCRA’s preferred method.”
9 See, for example, Australian Tax Ruling TR 94/14, May 31, 1994, paragraphs 90 and 138 to 41; and IC 87-2R, supra note 7, at paragraphs 31 to 32 and 35. See also Richard M. Wise, “Shall I Compare Thee?” (2000) vol. 8, no. 9 Canadian Tax Highlights 71.
While some cases have held that the factual and other assumptions underlying an assessment are relevant, in my view those cases are simply wrong. See *Chan v. The Queen*, 99 DTC 1215 (TCC), aff’d. 2001 DTC 5570 (FCA); and *Teck-Bullmoose Coal Inc. v. BC*, 2002 BCCA 101 (February 15, 2002).

See subsection 152(8) as interpreted in *The Queen v. Regina Shoppers Mall Limited*, 91 DTC 5101 (FCA), and section 166 of the Act as applied in *Kyte v. The Queen*, 97 DTC 5022 (FCA).

Part I of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c. 11 (herein referred to as “the Charter”). In *Donovan v. The Queen et al.*, 2000 DTC 6339 (FCA), it was held that certain evidence obtained via a Charter breach should be excluded but that the assessment would remain valid. In *The Queen v. Jurchison et al.*, 2001 DTC 5301 (FCA), leave to appeal dismissed November 1, 2001 (SCC), the court noted that in some cases evidence that might be inadmissible in a criminal case because of a Charter breach might be admissible in a civil tax trial. It has been argued that failing to disclose a secret comparable might in and of itself be a Charter breach. See Graham Webb, “Charter Issues in the Use of Secret Comparables” (Osgoode Hall Law School, unpublished). (I am indebted to Neil Brooks for bringing this paper to my attention.)

A technical term such as “correct” rather than a more emotive word such as “fair” has been used deliberately. The correct amount of tax is here defined as the amount determined by a correct application of the relevant provisions of the Act, properly interpreted, to all the relevant facts, properly understood.

See *Carey v. Ontario*, [1986] 2 SCR 637, at 647-48, where La Forest J on behalf of a unanimous bench stated, “It is obviously necessary for the proper administration of justice that litigants have access to all evidence that may be of assistance to the fair disposition of the issues arising in litigation.” For a tax case expressing the same principle, see *General Motors Acceptance Corporation of Canada, Limited v. The Queen*, 99 DTC 975, at paragraphs 33 to 34 (TCC).

I do not necessarily agree that this is in fact the rule.


In *In re Glover*, 80 DTC 6262, at 6265 (Ont. CA), aff’d. 82 DTC 6035 (SCC), the court said, in relation to what is now paragraph 241(4)(b), “This is a carefully circumscribed permissive subsection to ensure that the taxpayer who is being assessed or re-assessed, has knowledge of the basis of such assessment, etc.”

*Merxvant v. The Queen*, 2001 DTC 5245 (FCA). This does not mean that the parties must exchange arguments before trial, since there is nothing in the Tax Court of Canada Rules (General Procedure), SOR/90-688 (1990) vol. 124, no. 22 Canada Gazette Part II 4376-4463, as amended (herein referred to as “the TCC rules”), that requires such an exchange. Compare TCC rule 62, which requires an exchange of points to be argued on a TCC rule 58 motion.


It is sometimes suggested by the Crown in litigation that the only relevant information that must be disclosed is that which was relied on by the minister as part of the assessment process. This is clearly incorrect: the TCC rules as well as the case law thereon make it clear that all relevant information must be disclosed, whether or not the CCRA relied on it to form part of the basis for the assessment. See *Owen Holdings Ltd. v. The Queen*, 97 DTC 380 (TCC), aff’d. in part 97 DTC 5401 (FCA), where it was held that technical interpretations not relied on by the CCRA in the course of the assessment must be disclosed as part of the discovery process. See also the discussion of *Smithkline No. 1*, infra note 76. In *Standard Mortgage Investment Corp. et al. v. The Queen*, 2001 DTC 5245 (FCA), the court refused to permit discovery of documents that the Crown promised not to rely on. I agree with the annotation to this case in *Pound’s Tax Case Notes* (Toronto: Carswell, May 31, 2001), 198/01, that it was wrongly decided; the promise not to rely does not make the documents irrelevant, which is the only test for discovery.
SECRET COMPARABLES IN CANADIAN TRANSFER-PRICING LITIGATION ■ 55


22 McKinlay Transport Limited et al. v. The Queen, 90 DTC 6243 (SCC); and Regina Shoppers Mall Limited, supra note 11.


24 For a recent discussion of the international position on the use of secret comparables, see the report of the Ernst & Young survey in “Survey Finds Drug Companies Facing Tougher Transfer Pricing Challenges” (2001) vol. 10, no. 12 Tax Management Transfer Pricing Report 419-21. For the US position see Thomas S. Field, “Lyons: Use of Secret Comparables Threatens Competent Authority” (2000) vol. 86, no. 10 Tax Notes 1358. For the argument that the United States is prohibited by law from using secret comparables (because the Internal Revenue Service (“the IRS”) would have to reveal the data to the assessed taxpayer, contrary to the US confidentiality laws), see John A. Townsend, “Section 6103 and the Use of Third Party Tax Return Information in Tax Litigation” (1993) vol. 46, no. 4 The Tax Lawyer 923-45. Note, however, that the IRS in 1991 indicated that it would use secret comparables in necessary cases, provided it had National Office and Chief Counsel office approval. General Litigation Bulletin no. 369, June 1991.


28 See Matthew Wong and Glenn Desouza, “China’s Special Approach to Transfer Pricing” (March 2000) AMChat (a monthly magazine for members of the American Chamber of Commerce in Shanghai, available on PricewaterhouseCoopers China Web site).


30 On December 8, 1998, the Dusseldorf Tax Court ruled (see German Tax Law Decision Service Journal (DStRE) 1999, 787) that German tax auditors are not allowed to make use of secret comparables. In that case, the tax auditors based their transfer-pricing adjustment on the gross margins of four companies that they obtained from the tax files of the companies with the local tax offices. However, according to German tax secrecy law, the auditors were not allowed to disclose the names of these companies. The Dusseldorf Tax Court held that the revenue authorities were not allowed to base an income adjustment on secret comparables, since in this case the taxpayer did not have equal access to information used by the tax authorities and thus was not able to prove the incomparability of the comparables. A number of articles have been written about this case: see “Global Transfer Pricing Update—October 2000” (2000) vol. 21, no. 18 Tax Notes International 2033-46; Thomas Borstell and Michael Prick, “German Court Bans Secret Comparables” (1999) vol. 10, no. 4 International Tax Review 9-11; Alexander Vogele, “Debate Rages Over German Secrecy” (1999) vol. 10, no. 7 International Tax Review 9-10; and Ulf Andresen, “Germany’s Electronic Audit Guidelines: The Implications for Transfer Pricing Audits” (2001) vol. 10, no 9 Tax Management Transfer Pricing Report 310-12.

On appeal by the revenue authorities, in a judgment released on October 17, 2001 (Case I R 103/00), the Federal Tax Court reversed the lower court’s decision and remanded the case back to the Tax Court. See the unofficial translation by Ernst & Young (2002) vol. 10, no. 17 Tax Management Transfer Pricing Report 734-41. A number of articles have been written about
this appeal decision. See Ulf Andresen, “The Federal Tax Court’s Landmark Decision” (2002) vol. 10, no. 17 Tax Management Transfer Pricing Report 753-59; Oliver Wehnert and Peter Stalberg, “The Federal Supreme Tax Court’s Decision” (2002) vol. 10, no. 17 Tax Management Transfer Pricing Report 760-63; and Heinz-Klaus Kroppen, Stephan Rasch, and Achim Roeder, “German Federal Tax Court Issues Landmark Transfer Pricing Decision” (2001) vol. 24, no. 11 Tax Notes International 1111-15. The Federal Court ruled that the Tax Court could refrain from requesting files about comparable companies from the German revenue authorities if in the court’s view the taxpayer would have to inspect the data to understand the case against it, which would lead to an invasion of the comparable taxpayers’ right of secrecy. The Federal Court appears to have been of the view that the taxpayer would in most if not all cases have such a right of inspection because the right to know the case against the taxpayer is “a principle dominating all procedural law, that the participants should have prior knowledge of and of course take note of all actual foundations on which the court rests its judgment.” It is noteworthy that the court based this decision not only on the German tax laws but also on the principles set out in the OECD’s transfer-pricing guidelines, to which Canada adheres.

On the other hand, the Federal Court ruled that the Tax Court could not refuse to accept anonymous secret comparables derived by the German tax authorities from a secret database of transfer-pricing comparables to which the taxpayer would not have access. However, two points mitigate the harshness of this aspect of the decision: first, it appears from the case that in Germany the revenue authorities have the onus of proving that the price used by a taxpayer is not an arm’s-length price; second, the Federal Court ruled that the secret database used must fulfill minimum criteria regarding the quality of data collected. For that reason, the Tax Court may be obliged to make inquiries regarding the compilation and derivation of the anonymous comparison data. Should the German tax authorities not be allowed to answer because of taxpayer confidentiality (as one would expect would almost always be the case), this would weigh against the evidential value of the comparison data.

It is suggested that the first aspect of the case (the right to know the case against the taxpayer) also applies in Canada. However, given the difference in the onus of proof, it is suggested that the second aspect of this case (the right to use secret comparables) is not a valid precedent for the Canadian discussion of the policy aspects of the use of secret comparables.

35 IC 87-2R, supra note 7. See Regulation Update, published by the Institute of Chartered Accountants of Alberta recording a CCRA round table, May 11, 2000, Q/A 1 and the report of a conference of the International Fiscal Association (Canadian Branch) held on May 7, 2001 in Tax Analysts Worldwide Tax Daily, May 15, 2001, 2001 WTD 99-1, both of which cite IC 87-2R on the issue of secret comparables. The CCRA has announced that various memorandums will be issued to deal with specific transfer-pricing issues, one of which is supposed to concern transfer pricing. Although it is understood that drafting is underway, as yet no dates have been set for their publication. See Diane Bale, “Transfer Pricing in Canada—An Update” (2001) vol. 12, no. 2 Journal of International Taxation 6-11 and 45.
See the discussion of subsection 241(6) under “Procedural Matters” below.


92 DTC 6187 (FCA), rev’g. 91 DTC 5521 (FCTD).

Ibid., at 6188 (FCA).

See Patrick Bendin, “The Requirement of Confidentiality Under the Income Tax Act and Its Effect on the Conduct of Appeals Before the Tax Court of Canada” (1996) vol. 44, no. 3 Canadian Tax Journal 680-722, at 703-4, who views the case as an exception to the rules requiring disclosure in subsection 241(3). While this is technically true, the more important point, in my view, is that the case determined the CCRA’s inability to rely on the secret comparable.

The Promex Group Inc. v. The Queen, 98 DTC 1588 (TCC). It is understood that this case is under appeal.

Ibid., at paragraph 40.

In General Motors Acceptance Corporation, supra note 14, the Crown opposed a motion brought by the taxpayer to strike out certain paragraphs in the reply. In the course of denying the motion the court refused to accept an affidavit tendered by the Crown because it relied on material the Crown refused to disclose (at paragraph 18, note 7): “The Crown also filed an affidavit of Mr. Jim Nordin, an officer of Revenue Canada. Mr. Nordin’s affidavit relied on material that the Crown refused to produce and I am therefore reluctant to give any weight to Mr. Nordin’s affidavit. Material relied on by a deponent ought to be available to the opposing party to inspect and, if necessary, cross-examine the deponent. How else may the opposite party be comfortable with the fact the deponent has correctly conveyed relevant information in the document to the opposing party: Lex Tex Canada Limited (Plaintiff) v. Duratex Inc., [1979] 2 F.C. 722 (T.D.).”


Discussed in detail below.


See McKinlay Transport Limited, supra note 22; BC Securities Comm. v. Branch, [1995] 2 SCR 3; and R v. Fitzpatrick, [1995] 4 SCR 154; but see now The Queen v. Law, 2002 DTC 6789, at paragraph 16 (SCC), where the court holds that business documents can engage individual autonomy and thus may be entitled to privacy even in a regulatory context.

See Air Aronabee v. Min. of Transport (1989), 27 FTR 194 (FCTD), which has been cited on this point in a number of other cases.

Ibid., at paragraph 42.

See Gernhart v. The Queen, 99 DTC 5749, at paragraph 20 (FCA).


In R v. IRC, ex p Taylor (No. 2), [1989] 3 All ER 353 (QB), the court held that if in the course of an audit of one taxpayer the revenue authorities see information that may allow them to assess another taxpayer, they cannot make use of that information.

Subsection 165(3) of the Act. Under subsection 220.01, the minister has delegated this duty to the chiefs of appeal of each Tax Services Office, who rely on the recommendations of the appeals officers assigned to the file.

Revenue Canada, Appeals Renewal Initiative: Towards an Improved Dispute Resolution Process (Ottawa: Revenue Canada, April 17, 1997). For previous discussion, see Gordon S. Funt, “The Auditor

56 The formal summary prepared by an auditor to explain the basis of a reassessment.
57 The auditor’s notes of conversations with the taxpayer or others.
58 The phrase “taxpayer information” is defined in subsection 241(10):

“[T]axpayer information” means information of any kind and in any form relating to one or more taxpayers that is
(a) obtained by or on behalf of the Minister for the purposes of this Act, or
(b) prepared from information referred to in paragraph (a),
but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.

In Owen Holdings, supra note 20, the Court of Appeal held that advance rulings that had been redacted to avoid disclosing the identity of the taxpayers did not contain taxpayer information.


60 Revenue Canada, Ensuring Fair Customs and Revenue Administration in Canada: A Discussion Paper on Progress and an Invitation To Comment (Ottawa: Revenue Canada, March 1998).

61 It seems that whether this is a true exclusion would depend on whether the information fell within any of paragraphs 241(3)(b) and (4)(a) and (b) of the Act, discussed in detail below. Furthermore, if that personal information did not directly or indirectly identify the third person, it would not be confidential because of the exemption in the definition of “taxpayer information” in subsection 241(10).

62 This exclusion reflects the Crestbrook case, supra note 39. Interestingly, the leaflet does not state that such information cannot be used by the CCRA to assess another taxpayer.

63 It is not clear how there could be an ongoing investigation when the leaflet is premised on the assumption that the assessment has been issued and a notice of objection filed.

64 CCRA document no. 8M17870, December 1, 1997.

65 RSC 1985, c. A-1, as amended. For individuals, the equivalent statute is the Privacy Act, RSC 1985, c. P-21, as amended. The issues under both are the same, and only the first is referred to here.

66 In Rubin v. Canada, [1998] 2 FC 430 (CA), the court said that it is rare for legislation nowadays to contain purpose clauses; therefore, the fact that Parliament included a purpose clause in section 2(1) of the Access Act is significant. Accordingly, any exemption to access must be interpreted in light of the purpose clause.


68 The general rule is that the terms in section 20 of the Access Act are to be given their common, dictionary meaning. Tridel Corp. v. Canada Mortgage and Housing Corp. (1996), 115 FTR 185. For a definition of some of the terms used in section 20 of the Access Act, see Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 FTR 42; and Perly’s Maps Ltd. v. Deputy MNR (1986), 11 TBR 236.

69 For a case comparing federal law requiring an objective standard to Manitoba law requiring a subjective standard, see Kattenburg v. Manitoba (1999), 143 Man. R (2d) 42 (QB).

70 Tridel, supra note 68. The existence of section 20 of the Access Act does not limit any other rule by which disclosure may be obtained. See Otu v. Minister of Employment and Immigration (1994), 77 FTR 67; and Canada Post Corp. v. Canada, [1993] 3 FC 320 (TD), aff’d. [1995] 2 FC 110 (CA).
The exemptions in section 20(1) can be overcome by section 20(6) of the Access Act, which permits the government to disclose the third party information if doing so would be in the public interest: “20(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.” However, given the requirement that public health, safety, or the environment be at issue, section 20(6) does not appear to apply to a tax issue.

TCC rule 81.

TCC rule 89.

TCC rule 82.

TCC rules 92 to 100.

See Owen Holdings, supra note 20, which considered the scope of the “relating” rule in discovery matters and held that something will relate to a matter in issue when it may advance one party’s case or may destroy the other party’s case. The threshold is a low one and the scope of discovery is very wide, although not infinite. Owen Holdings was followed on this point in a transfer-pricing case, Smithkline Beecham Animal Health Inc. v. The Queen, 98 DTC 1929 (TCC) (herein referred to as “Smithkline No. 1”). See also Smithkline No. 3, supra note 19, at paragraphs 10 and 13. For a comment on the latter case, see François Vincent, “The Use of Secret Comparables in Canada: Take 3,” Tax Analysts Worldwide Tax Daily, February 26, 2001, 2001 WTD 46–4.

73 DTC 5347 (FCA).

87 DTC 5157 (FCTD).

98 ATC 4578 (FC).

Ibid., at 4579.

Ibid.

Supra note 19, at paragraph 15.

Ibid., at paragraph 17.

See also the Bassermann case. This case has an involved history. The minister assessed Mr. Bassermann under the Unemployment Insurance Act for unpaid employee withholdings and employer premiums. Bassermann said the employees were really contractors. On January 8, 1991, in response to a motion by Bassermann, Chief Judge Couture ordered that the minister disclose the putative employees’ tax returns to Bassermann to allow Bassermann to see on what basis they had filed those returns. The minister failed to comply with that order, and in a subsequent motion brought by Bassermann, the court vacated the assessments: [1991] TCJ no. 724 (TCC). On judicial review, the Federal Court of Appeal held that the Tax Court had failed to address whether the minister had in fact failed to comply and remitted the matter back to a different judge of the Tax Court: [1993] FCJ no. 388 (FCA). On remittance, the Tax Court again vacated the assessments: [1993] TCJ no. 329; and this decision was upheld on judicial review: Canada (Attorney-General) v. Bassermann (1994), 114 DLR (4th) 104 (FCA). The important point is that the minister did not rely on the putative employees’ returns in assessing Bassermann, yet was required to disclose those returns.

The minister is a federal tribunal whose decisions may be subject to judicial review in the Federal Court of Canada. In such proceedings, the general rule is that only the evidence before the minister at the time he or she made the decision in issue is admissible. But transfer-pricing cases before the Tax Court are appeals de novo; hence, even material that the minister did not rely on is relevant. Gitxsan Treaty Society v. Hospital Employee Union, [2000] 1 FC 135 (CA).
Theoretically the taxpayer might obtain CUP information from its competitors voluntarily, but this is obviously very rare. A taxpayer might also be able to discover a competitor on CUP information under TCC rule 99 or obtain documents from the competitor under rule 86; but the case law on those and comparable provincial rules makes it unlikely, in my view, that a court would order production under those rules (although this cannot be ruled out entirely). Such third-party discovery was allowed in a transfer-pricing case, Re Federal Commissioner of Taxation; Ex parte Swiss Aluminium Australia Ltd. (1986), 68 ALR 587 (FC Gen. Div.), and in a trade practices case, which is closely analogous to a transfer-pricing case, Conrock v. CSR (1990), 96 ALR 690 (FC Gen. Div.). See also Glaxo Wellcome PLC v. MNR, [1998] 4 FC 439 (CA), leave to appeal refused December 10, 1998, [1998] SCCA no. 422, where the court granted an equitable bill of discovery against the minister in civil litigation to which the minister was not a party. Practically speaking, then, if the CUP method is to have any real meaning for taxpayers, they must be allowed to obtain third-party information on similarly situated taxpayers from the Crown on discovery.

As defined in subsection 241(10); see supra note 58.

See the discussion of paragraph 241(3)(b) in The Queen et al. v. Harris, 2001 DTC 5247 (FCA), and see Smithkline No. 3, supra note 19, where the court would have applied paragraph 241(3)(b) had it found the requested information to be relevant to the pleadings.

Although “necessary” could mean “absolutely necessary,” which would be difficult to prove in respect of any one piece of evidence in a tax appeal, it is more likely that in the context of a tax appeal, it means “convenient, useful, appropriate, suitable, proper, or conducive” to the task of determining the taxpayer’s tax payable. See the definition of “necessary” in Black’s Law Dictionary, 6th ed.; and Mageau v. Mageau (1978), 22 OR (2d) 179 (HCJ). In Science Research Council v. Nassé, [1980] AC 1028, at 1071 (HL), Lord Salmon said, “The law has always recognised that it is of the greatest importance from the point of view of public policy that proceedings in the courts or before tribunals shall be fairly disposed of. This, no doubt, is why the law has never accorded privilege against discovery and inspection to confidential documents which are necessary for fairly disposing of the proceedings. What does ‘necessary’ in this context mean? It, of course, includes the case where the party applying for an order for discovery and inspection of certain documents could not possibly succeed in the proceedings unless he obtained the order; but it is not confined to such cases. Suppose, for example, a man had a very slim chance of success without inspection of documents but a very strong chance of success with inspection, surely the proceedings could not be regarded as being fairly disposed of, were he to be denied inspection.”

See, for example, Page et al. v. The Queen, 96 DTC 1872 (TCC). The taxpayers had been assessed under section 227.1 for director’s liability. Certain of the directors had not been so assessed. The assessed directors applied for an order compelling the minister to give them information relating to why the non-assessed directors had not been assessed. The court held that the minister had to disclose the information. The court relied on paragraph 241(4)(b) and stated, at 1874, “In each of the Appellants’ cases, the documents sought are not the income tax returns of any other person. They, to the extent that any such documents exist, may contain inaccurate information. In addition, such documents may have influenced the decision or decisions of officers of Revenue respecting the liability of directors of Déjà Vu Management Inc. It is my conclusion that the Appellants are entitled to same [emphasis added].”

Barrett and Vincent, supra note 8, at note 7 and text, suggest that Route Canada Real Estate Inc. v. The Queen, 95 DTC 502 (TCC), was decided under paragraph 241(4)(b), but with respect it is clear from the judgment that the respondent’s counsel withdrew her objection to disclosure under subsection 241(1), so that paragraph 241(4)(b) was not an issue.

RSC 1985, c. T-2, as amended, section 12.

Ibid., section 20.

RSC 1985, c. I-21, as amended.
SECRET COMPARABLES IN CANADIAN TRANSFER-PRICING LITIGATION • 61

95 (1879-80), 5 App. Cas. 214, at 225 (HL).
98 Ibid. Paragraphs 20 and 22 are per Lord Hoffman and paragraph 43 is per Lord Scott, both of whose judgments are agreed with by the other three members of the court.
99 See also Ruby v. Canada, [2000] 3 FC 589, at paragraph 55 (FCA) (leave to appeal granted May 25, 2001 (SCC)), where the court adopted the following comments of Thorson JA in Re Falconbridge Nickel Mines and Ont. Min. of Revenue (1981), 121 DLR (3d) 403, at 408 (Ont. CA): “In some contexts, of course, the word ‘may’ is neither necessarily permissive nor necessarily imperative, but rather merely empowering. Its function is to empower some person or authority to do something which, otherwise, that person or authority would be without any power to do.”
100 RSC 1985, c. C-5, as amended.
101 The Tax Court of Canada is not currently a superior court, although it has been proposed to change this. See Bill C-30, An Act To Establish a Body That Provides Administrative Services to the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada, To Amend the Federal Court Act, the Tax Court of Canada Act and the Judges Act, and To Make Related and Consequential Amendments to Other Acts, first reading in Senate March 5, 2002. Thus, at this time, subsection 37(3) would apply.
104 Note that the rule requires a court to exclude the evidence, even if the matter is not raised by either party. Carey v. Ontario, supra note 14. A corollary is that the Crown may not waive the privilege except, it appears, by relying on the information to support its case in court. Director of Investigation & Research v. Superior Propane Inc. (1998), 85 CPR (3d) 188 (Competition Tribunal).
106 See, by analogy, the discussion of section 41 of the Federal Court Act in Huron Steel, supra note 77, at 5352.
107 See, for example, the four broad categories set out in Regional Municipality of Niagara v. 451624 Ontario Inc. et al.; Imperial Oil Limited et al. (Third Parties), [1985] OCP 168 (Ont. HCJ).
109 See the numerous cases that have arisen under the Competition Act where the courts have consistently upheld the right of the director to claim public interest privilege over information gathered from third parties in the course of his investigation, even where that information is used to support a complaint against a particular person, provided that the director provides a summary of the relevant third-party information to the particular person. The seminal case is Canada (Director of Investigation and Research) v. Southam Inc. (1991), 38 CPR (3d) 68 (Competition Tribunal), per Reed J, acting judicial member, followed in numerous cases.
110 Supra note 77, at 5351. Note that this passage reinforces the argument made above that ability to see a secret comparable that has been the basis of an actual or proposed assessment will generally be considered a necessity for purposes of paragraph 241(4)(a) and (b).
111 In Reynolds, Re (1996), 25 BCLR (3d) 148 (SC), the court held, refusing to follow Canada (Procureur General) v. Belanger (1987), 42 CCC (3d) 82 (Que. CA), that section 37(2) of the Canada Evidence Act did not give a court the discretion to override the general confidentiality rule in subsection 241(1) of the Income Tax Act. Belanger was also not followed in MNR v. J.D. Fawcett et al., [1988] 2 CTC 62 (BCSC). However, given the clear conflict between the three cases, that issue cannot be said to be settled, and a taxpayer might well want to bring an application under section 37(2) should none of the exceptions to section 241 apply.
112 Supra note 42.
113 Ibid., at 1591-92.
114 Supra note 86.
115 RSC 1985, c. 1 (2nd Supp.), as amended.
116 It does not appear that the Customs Act contains an equivalent to the prohibition in subsection 241(2) of the Income Tax Act whereby information may not be disclosed in non-tax-related litigation.
117 No argument was addressed by the court on whether “may” in that paragraph could be imperative or empowering in these circumstances. In my view, the word “may” in its context was not discretionary.
118 Another way of seeing the same thing is as follows. As noted by the court in Glaxo, the federal Crown has a traditional and longstanding common law immunity from discovery. Why, then, may one discover the CCRA in a traditional Tax Court case? Section 17 of the Interpretation Act states that no statute or regulation is binding on the Crown unless that enactment says so expressly or by necessary implication. Prima facie, therefore, the TCC rules dealing with discovery would not apply to the Crown. However, section 27 of the Crown Liability and Proceedings Act, RSC 1985, c. C-50, as amended, states that the federal Crown is bound by the rules of the court in which proceedings are taken. Thus, the common law immunity to discovery is overcome by a combination of statute and regulation. There is no suggestion that the TCC rules relating to discovery should be read as subject to the traditional common law immunity. The same should be true for the Crown’s common law privilege against disclosing informants’ names. The combination of section 17, section 27, and the TCC rules clearly displaces that common law privilege.

119 See Davidson v. Solicitor-General of Canada (1987), 41 DLR (4th) 533, at 543 (FCTD), aff’d. [1989] 2 FC 341 (CA), where the court stated, with respect to the informant’s privilege, “Any alteration of this common law rule must be done by way of statute in clear and explicit terms.” In my view, paragraph 241(3)(b) meets that test, unlike section 308 of the Code of Civil Procedure in issue in Bisaillon v. Keable, [1983] 2 SCR 60.
120 Although the court stated that it was not prepared to dismiss the taxpayer’s motion on this basis, it is notable that the court felt it had to bolster its decision on informant’s privilege by reiterating that the informer’s identity was irrelevant. In any case, as noted above, in transfer-pricing cases, the identity of the person from whom a secret comparable is derived may be very relevant to the usefulness or otherwise of the comparable.
121 (1996), 145 Nfld. & PEIR 112 (Nfld. CA).
122 The other exceptions are when the innocence of the accused is at stake, a limitation reserved for criminal trials; if the informer has acted as agent provocateur; and if the accused seeks to establish that a search was not undertaken on reasonable grounds and therefore contravenes section 8 of the Charter of Rights.
123 Supra note 121, at paragraph 16.
124 See Bisaillon, supra note 119.
126 Interestingly, subsection 241(7) does not expressly permit the appeal court to modify the order, although no doubt an appeal court would read that power into it.
127 It has been argued that subsection 241(6) applies only to appeals not covered by subsection 241(3)—that is, civil cases unrelated to the Act. See Bendin, supra note 41, at 716-17. With respect, I do not agree. Under subsection 241(2), orders of disclosure may not be made in cases unrelated to the Act. It is difficult to see how subsection 241(6) could be directed only to those cases.
In Owen Holdings, supra note 20, the taxpayer argued that the Crown had failed to notify the third parties and hence the Crown’s appeal was invalid. The court held, ibid., at 5403 (FCA), that under the terms of the Tax Court’s order, all identifying information had to be severed; hence, the remaining information was not “taxpayer information” within the meaning of subsection 241(10), so that the notification condition of subsection 241(6) did not apply. With respect, this conclusion cannot be right. If the information was not taxpayer information, subsection 241(6) could not have applied at all, so that the appeal would have been invalid ab initio. It is suggested that a court may want to revisit the notification condition of subsection 241(6) in a future case.