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Deal privilege may no longer protect shared legal advice following Minister of National Revenue v. Iggillis Holdings Inc., 2016 FC 1352

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A recent decision of the Federal Court of Canada may have significant implications for how commercial parties conduct themselves. During the course of due diligence, it is not uncommon for parties to wish to share privileged communications in furtherance of a proposed transaction. There had been increasing recognition in Canada that parties could do so, without waiving applicable privilege, under the concept of "common interest privilege." In *Minister of National Revenue v. Iggillis Holdings Inc.*, 2016 FC 1352 (*Iggillis*), the Federal Court has cast considerable doubt on this practice. If this decision, currently under appeal, becomes the leading authority in this area, parties will have to change their practices in respect of due diligence and certain kinds of transaction planning. In particular, sharing privileged communications among parties to a commercial transaction will have to be avoided, unless the parties are represented by the same law firm.

Common interest privilege

Solicitor-client privilege protects communications between a lawyer and a client that are made for the purpose of seeking or giving legal advice, which are intended by the parties to be confidential. Normally, deliberately sharing a privileged communication with a third party is a waiver of privilege. The reason for this is that disclosure of a privileged communication to a third party is incompatible with the idea that it was intended to be confidential, which is at the core of the doctrine of privilege. However, a series of decisions by the Federal Court and provincial Superior Courts has acknowledged that parties to a commercial transaction may be permitted to share privileged legal opinions with one another in furtherance of their common interest in executing a transaction, without waiving privilege. Where parties share a "common interest" in getting the deal done, courts have been prepared to protect that common interest because there are economic and social benefits if parties engaged in commercial transactions are free to exchange privileged communications "without fear of jeopardizing the confidence that is critical to obtaining legal advice."[1] Common interest privilege does not apply to every shared communication. Whether privilege has been waived will depend on the facts of each case and the expectations of the parties.

Prior to *Iggillis*, the leading Federal Court case in this area was *Pitney Bowes of Canada Ltd. v. Canada*[2] (*Pitney Bowes*). In *Pitney Bowes*, the Canada Revenue Agency (the CRA) demanded

disclosure of a legal opinion that one party to a proposed transaction had shared with the other parties. The Federal Court held that privilege had not been waived by distribution to the other parties. The Court noted that the opinions had been prepared for the purpose of distribution and sharing them benefited all the parties in advancing the transaction. The principles outlined by the Court in the *Pitney Bowes* case have been applied in several subsequent cases in both Federal Court and provincial Superior Courts to uphold common interest privilege over shared documents[3].

The authority of this line of cases has been called into question in its entirety by the Federal Court's decision in *Iggillis*.

Iggillis

In *Iggillis*, the CRA was seeking a copy of a legal memorandum (the Memo) prepared in the course of a set of commercial transactions. The Memo had been prepared by counsel to Abacus Capital (Abacus) to discuss the tax issues arising from the transactions and set out a series of steps to permit the sales to be completed on the basis that was most tax efficient to both vendors and the purchaser. Abacus' counsel circulated the Memo to the vendors' counsel to ensure that vendors understood the transaction steps to be undertaken and the associated tax and legal risks. The Memo was therefore important in advancing negotiations but would also, if disclosed, provide the CRA with a "road map" of possible arguments it could use to challenge the parties' tax reporting.

The Court found that the Memo reflected legal advice prepared by each lawyer for his respective client and was therefore protected by solicitor-client privilege. The issue was therefore whether that privilege had been lost when the Memo was shared. The Court held that it had been.

The Court noted that common interest privilege first arose when joint criminal defendants both received legal advice from a single counsel to permit the sharing of defence strategies. The doctrine had subsequently been applied in civil as well as criminal litigation and then to purely transactional contexts in which the shared documents were said to be protected by "advisory" (as opposed to litigation) common interest privilege. The Court distinguished cases of "joint client privilege" in which the parties both received legal advice from a single firm from cases in which separate but "allied lawyers" shared legal opinions in order to advance a coordinated legal strategy.

Relying on recent U.S. jurisprudence (including in particular the recent *Ambac Assurance Corp v. Countrywide Home Loans Inc.* decision of the New York Court of Appeals) and academic commentary, the Court concluded that advisory common interest privilege was irreconcilable with the doctrine and rationale underlying solicitor-client privilege. The Court was also concerned that the expansion of advisory common interest privilege had impeded the administration of justice by unfairly placing potentially relevant evidence off limits to other litigants, governmental authorities and the courts themselves. In the Court's view, advisory common interest privilege really serves only two purposes, neither of which was worth protecting: first, it enables transactions that anticipate litigation; second, it provides the claimants with a significant strategic advantage when litigation ensues by denying opposing parties and the Court access to important evidence.

The Court ultimately concluded that any advantages associated with advancing commercial transactions are outweighed by the costs to the administration of justice and the impairment of the "truth-seeking legal process" of the courts.

The Court stated that over-claiming common interest privilege in the deal context is a

common practice which creates the potential for abuse, especially in the area of large-value merger and acquisition transactions. Further, protecting advisory common interest privilege promotes litigation and non-compliance with existing law by enabling high-risk transactions and protecting communications that could demonstrate unlawfulness. The Court appeared to accept at face value the CRA's assertion that advisory common interest privilege in the transactional context is typically asserted by parties with suspect motives. The Court saw such abusive tax avoidance schemes as greatly benefiting from common interest privilege but without providing meaningful economic or social benefits to society.

Based on the above analysis, the Court concluded that advisory common interest privilege could not protect the Memo in this case from disclosure to the CRA. The Court distinguished *Pitney Bowes* on the basis that it concerned joint-client representation, unlike the allied lawyer common interest privilege asserted by the parties in *Iggillis*. The Court went further, however, in stating that the Federal Court in *Pitney Bowes* had applied unsound jurisprudence that relied on the "false" policy rationale of fostering commercial transactions and was no longer good law.

Where does *Iggillis* leave us?

The decision in *Iggillis* has been appealed to the Federal Court of Appeal. However, until the Federal Court of Appeal weighs in, the status of advisory common interest privilege, previously commonly accepted in the transactional context, is now highly uncertain. This decision will place significant restrictions on the ability of parties to share privileged materials in the context of an acquisition transaction or other commercial arrangement between arm's length parties.

Iggillis effectively restricts the application of advisory common interest privilege in the deal context to situations in which the shared communications are also protected by a direct joint solicitor-client relationship, *i.e.,* where all of the parties to the transaction are represented by the same counsel or firm. Privilege over the legal advice of "allied lawyers," such as where a vendor's and a purchaser's counsel collaborate on or share their analysis of the tax and legal issues, whether arising from a proposed transaction directly or from a previously existing piece of litigation or potential litigation, may now be considered to have been waived if it is shared with a proposed counterparty. In these situations, it will be significantly more difficult to resist production to the CRA, regulators or third parties on the basis of common interest privilege.

In this respect, *Iggillis* is very much at odds with *Pitney Bowes*. It is difficult to predict how other judges will reconcile the two decisions, which emanated from the same Court. *Iggillis* is the more recent decision, and considers developments in U.S. law which post-date *Pitney Bowes*. As such, at a minimum, the value of *Pitney Bowes* as a precedent is now very much open to question.

It is also important to note that *Iggillis* is also at odds with a number of decisions of provincial Superior Courts. Those decisions have typically arisen in the context of attempts to obtain privileged communications in civil litigation. *Iggillis* is not binding on provincial Superior Courts, so it will not, strictly speaking, affect the precedential value of prior Superior Court decisions. However, many of the Superior Court decisions have followed the reasoning in *Pitney Bowes*. Moreover, parties to commercial transactions will have to consider the risk of waiver, both with respect to future civil litigation and with respect to the tax authorities. As such, parties may end up choosing to take the more conservative approach mandated by *Iggillis*, regardless of what might be considered permissible in the provincial courts.

At the core of the decision is the conclusion by the Court that the benefits associated with the

protection of privileged communications that are disclosed in the context of a potential commercial transaction were highly speculative, while the cost to the administration of justice was obvious (*i.e.* the suppression of relevant documents that a counterparty in litigation — in this case the taxing authority — might otherwise have access to).

Both of these conclusions appear to be open to significant debate, and will no doubt attract attention. Common interest privilege operates, in limited circumstances, to negate the waiver of privilege that would otherwise occur when a privileged document is shared with a third party. If this decision becomes the leading authority, and the act of sharing a privileged communication with a counterparty to a proposed transaction is to be viewed as a waiver of privilege, then that sharing will not take place. In those circumstances there is no benefit to the administration of justice.

Further, it has to this point been widely accepted that parties to transactions often have entirely legitimate objectives in seeking to assess a particular legal risk applicable to or affecting a counterparty through a review of privileged materials. Doing so can in certain transactions be critical to the parties being able to proceed, such as where the buyer of an asset or corporation will in effect inherit the risk in question. If, as a result of this decision, that practice has to cease, then there is legitimate reason to be concerned that the effect of this decision will be to impose a significant impediment to the execution of transactions going forward.

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[1] *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344 at para. 14.

[2] (2003), 57 DTC 5179 (Fed. Ct.).

[3] See for example *Trillium Motor World* v. *General Motors et. al.*, 2014 ONSC 1338 (CanLII), affirmed 2014 ONSC 4894 (CanLII)