Federal Court of Appeal Cour d'appel fédérale

Date: 20180306

Docket: A-465-16

Citation: 2018 FCA 51

CORAM: **WEBB J.A.**
BOIVIN J.A.
RENNIE J.A.

BETWEEN:

IGGILLIS HOLDINGS INC. and IAN GILLIS

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

and

ABACUS CAPITAL CORPORATIONS MERGERS AND ACQUISITIONS,
THE FEDERATION OF LAW SOCIETIES OF CANADA and THE CANADIAN BAR ASSOCIATION

Interveners

Heard at Edmonton, Alberta, on October 2, 2017.

Judgment delivered at Ottawa, Ontario, on March 6, 2018.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: BOIVIN J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This appeal raises the issue of whether solicitor-client privilege continues to apply to a legal opinion that is disclosed to a person who is not the client of the lawyer who wrote the opinion but who is involved in common transactions with the client of that lawyer. The Federal Court judge (2016 FC 1352) found:

(a) at paragraph 72 of his reasons, that "the Memo is legal advice provided by the lawyers to their clients in the strictest confidence and protected from disclosure under SCP [solicitor-client privilege] subject to whether the privilege has been waived or is protected by CIP [common interest privilege]"; and

(b) at paragraph 300 of his reasons, that "advisory CIP is not a legitimate or acceptable application of solicitor-client privilege" and, therefore the legal opinion was to be disclosed to the Minister of National Revenue (Minister).

[2] For the reasons that follow I would allow the appeal.

I. Background

[3] Abacus Capital Corporations Mergers and Acquisitions (Abacus) is comprised of a number of corporations, partnerships and trusts. It provides tax advice in relation to corporate transactions. Any tax saving arising from its advice is shared by the persons who use its services. In this case, Abacus structured a series of transactions which resulted in an Abacus entity

acquiring the shares of the corporations that had been held by IGGillis Holdings Inc. and Ian Gillis (collectively, Gillis).

[4] Abacus was represented by Joel Nitikman of Fraser Milner Casgrain LLP (now Dentons Canada LLP) and Gillis was represented by Richard Kirby of Felesky Flynn LLP. As a result of various discussions between counsel for each side of the transaction, the proposed transactions were finalized and summarized in a series of charts. Joel Nitikman (with input from Richard Kirby) produced a memorandum which indicated for each step in the series of transactions the implications that, in the opinion of the authors of the memo, would arise under the applicable taxing statutes. Following the completion of the transactions the Minister served two requirements (the Requirements) under subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 to produce this memorandum – one on IGGillis Holdings Inc. and the other on Ian Gillis. The only counsel who appeared at the hearing of this appeal for Abacus and Gillis was Joel Nitikman.

[5] Following the hearing of this appeal, two documents were delivered to this Court in a sealed envelope – a copy of 18 pages of diagrams showing, what would then have been, the proposed transactions and a memorandum which identified each step illustrated in the charts and provided the opinion with respect to the implications of that step. The 18 page series of diagrams illustrating the transactions only contain minimal legal advice. Although both documents were in the envelope it is far from clear whether privilege is claimed for both. The Federal Court judge noted, in paragraph 66 of his reasons, that “[w]hile the diagrams depicting the transactions might not be said to be privileged, I understand that this information is known to the Minister”.

Certainly the Minister has the right to know what transactions were completed by taxpayers. The transactions that have been completed would have been disclosed in filings and documents available to the Minister and therefore, the transactions themselves would no longer be considered confidential *vis-a-vis* the Minister.

[6] In paragraph 3 of their memorandum of fact and law, Abacus and Gillis indicate that the "Memo" which is the subject of this appeal, is the memorandum in which the lawyers opine "on how to buy the shares in the most tax-efficient manner". While there are a few notations of the application of provisions of the *Income Tax Act* on some of the diagrams, the memorandum is the more detailed explanation of the opinions of the lawyers. As well, the memorandum is marked "***PRIVILEGED & CONFIDENTIAL***" but there is no similar notation on the diagrams.

[7] The focus of the Federal Court was on the memorandum marked "***PRIVILEGED & CONFIDENTIAL***" in which the opinions on the legal implications of the transactions are expressed. In this appeal the focus continued to be on this memorandum. In these reasons this memorandum will be referred to as the Abacus memo.

[8] In paragraph 69 of his reasons, the Federal Court judge stated that: "[t]he content of the Memo is almost exclusively advice describing the legal effects in terms of each step in the Transaction". I agree with this description of the Abacus memo. The Federal Court judge also found in paragraph 45 that "[t]he legal advice culminates in the Abacus Memo, which is primarily the work product of Abacus, based on its significant experience in similar transactions, but with the contribution of the Respondents' lawyer, at least as depicted in the disclosed emails"

and in paragraph 68 that “the Abacus memo was the fruit of cooperative efforts of both lawyers who were highly experienced in the legal considerations of income tax and related commercial law subjects”.

[9] The Abacus memo was sent to Abacus and Gillis. Gillis was not the client of Joel Nitikman and Abacus was not the client of Richard Kirby.

II. Decision of the Federal Court

[10] The Minister argued that there was no common interest as between Abacus and Gillis as they were on the opposite sides of the proposed transactions. However, the Federal Court judge rejected this argument:

> 83 I do not agree with this submission. While it is true that the parties to a purchase and sale agreement are generally adverse in interest, when they are working cooperatively to reduce taxes payable on the sale of shares, the two parties share a common interest with regard to that legal issue. The Abacus memo related only to that issue because legal opinions drove the Transaction. This is similar to the facts in Pitney Bowes [*Pitney Bowes of Canada v. Her Majesty the Queen*, 2003 FCT 214, 225 D.L.R. (4th) 747], where at paragraph 4 it was noted that "multiple parties needed legal advice in areas where their interests were not adverse" and for the goal of "[h]aving the trans-action concluded".

[11] The Federal Court judge also noted that common interest privilege is well entrenched in Canadian law:

> 91 Besides, more recent American jurisprudence (see e.g. *Shipyard Associates; Teleglobe*) has recognized CIP in circumstances almost identical to those in this matter, which I do not need to describe, inasmuch as I accept the Respondents' argument that CIP in transactional circumstances is strongly implanted in Canadian law and indeed around the common-law world.

[12] However, immediately after acknowledging that common interest privilege "is strongly implanted in Canadian law and indeed around the common-law world" he stated that, essentially in his view, this was not correct:

> 92 Despite the Court's acknowledgment of the challenge it faces in terms of the recognized stature of CIP, it nevertheless is very strongly of the view that CIP is not a valid component of SCP doctrine for the reasons that follow in the next section.

[13] In paragraph 298 of his reasons the Federal Court judge set out a number of summary points that, in his view, supported his finding that "[a]dvisory CIP is not a valid constituent form of SCP and therefore has no application to the facts of this case".

[14] Although lengthy, the Federal Court judge's reasons are essentially centered around two concerns – the concern that the court have all of the relevant evidence and the decision of the New York Court of Appeals in *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 36 N.Y.S.3d 838 (Ct. App., 2016) (*Ambac*). The Federal Court judge also referred extensively to the article by Professor Grace M. Giesel of the University of Louisville's Brandeis School of Law ("End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting" (2011) 95 Marq. L. Rev. 475 (the Giesel article.)). The Giesel article was quoted in *Ambac*.

III. Issue

[15] The issue in this appeal is whether the Federal Court judge was correct in finding that common interest privilege is not a valid principle of law that could be applied to the Abacus

memo in this case. Since this is a question of law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. Analysis

[16] In *Solosky v. Her Majesty the Queen*, [1980] 1 S.C.R. 821, at page 837, 105 D.L.R. (3d) 745, at page 758, the Supreme Court set out the general criteria that must be met for a document to be privileged:

> As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties….

[17] The Abacus memo entails the giving of legal advice. The Abacus memo was largely prepared by Joel Nitikman with input from Richard Kirby. Each lawyer sent the memo to their respective clients. Therefore, the opinions expressed by Joel Nitikman were communicated by him to his client (Abacus) and the opinions of Richard Kirby were communicated by him to his client (Gillis). Therefore, the first two criteria, as set out above, are satisfied in this case. The issue, in this appeal, relates to the third criterion – confidentiality.

[18] The Federal Court judge found, at paragraph 72 of his reasons, that the Abacus memo was subject to solicitor-client privilege, subject only to whether privilege had been waived or common interest privilege would result in the memo remaining privileged:

> 72 I conclude, therefore, that the Memo is legal advice provided by the lawyers to their clients in the strictest confidence and protected from disclosure under SCP [solicitor-client privilege] subject to whether the privilege has been waived or is protected by CIP.

[19] I agree with this conclusion. If Joel Nitikman would have written one opinion for Abacus and this opinion was shared with Gillis, this opinion would have been privileged when communicated to Abacus and the issue would be whether the communication to Gillis would result in a loss of that privilege. If Richard Kirby would also have written a separate opinion for Gillis and this opinion was shared with Abacus, that opinion would also be privileged when communicated to Gillis and the issue would be whether the communication to Abacus would result in a loss of that privilege. In my view, the result should not be different because a single opinion was prepared based on input from the two lawyers. When dealing with a statute as complex as the *Income Tax Act*, it may well be more efficient and the interests of the respective clients may well be better served if the lawyers collaborate on the opinion that is to be provided in relation to the application of that statute to the series of transactions to be completed by the parties.

[20] At one time if a privileged document was disclosed to a third party, privilege in that document was lost regardless of how it was disclosed to that third party. In *Derco Industries Ltd. v. A.R. Grimwood Ltd.*, [1984] B.C.J. No. 1894, 1984 CarswellBC 1498, Justice Esson of the British Columbia Court of Appeal in Chambers noted that there were "a number of authorities in support of the principle that once a privileged document is disclosed in any way to a third party, that is a third party to the privilege, the privilege is lost." However, this case was cited by the British Columbia Court of Appeal in the subsequent case of *Maximum Ventures Inc. v. De Graaf*,

2007 BCCA 510, 409 W.A.C. 215 (*Maximum Ventures*), where that Court held, at paragraph 14 (which is cited below), that privilege was not lost when an opinion was disclosed to another party with a common interest in completing the transactions.

[21] The views of the British Columbia Court of Appeal that disclosure to third parties did not automatically result in a loss of privilege are consistent with the conclusion of the Federal Court judge that common interest privilege has been applied in many common law jurisdictions to maintain privilege over opinions of counsel that are disclosed to other parties with a common interest in completing transactions to which the privilege relates.

[22] Although the Federal Court judge found, in paragraph 91 of his reasons, that common interest privilege "in transactional circumstances is strongly implanted in Canadian law and indeed around the common-law world", he found that it is not a valid principle of law. As noted above in paragraph 14, two recurring themes appear to dominate in his reasons – the potential loss of evidence if the Abacus memo is not disclosed and the decision of the New York Court of Appeals in *Ambac* which referred to the Giesel article.

A. *Evidence*

[23] The concern about the ability of the Court to have all of the relevant evidence if the Abacus memo is not disclosed is raised in paragraphs 14, 17, 120, 153, 156, 162, 194,195, 198, 223, 224, 233, 239 – 242, 245, 261, 262, 289, 290, 296, and 298 of the Federal Court judge's reasons.

[24] As noted above, in paragraph 69 of his reasons, the Federal Court judge stated that: “[t]he content of the Memo is almost exclusively advice describing the legal effects in terms of each step in the Transaction”.

[25] The question which would then arise is whether the advice describing the legal effects of the transactions would be evidence that would be admissible in Court.

[26] In *Syrek v. Her Majesty the Queen*, 2009 FCA 53, 2009 D.T.C. 5063, Justice Nadon, writing for this Court, addressed the admissibility of a legal opinion on an issue of domestic law that was to be determined by the court:

> 28 The questions asked of Ms. Ashenbrenner and the answers she provided in regard thereto were clearly directed, in my respectful view, to an issue of law which the Judge had to decide. It is trite law that questions of law are not questions in respect of which courts will admit opinion evidence. In *The Law of Evidence in Canada*, John Sopinka & Sidney N. Lederman & Alan M. Bryant, 2d ed. (Toronto and Vancouver: Butterworths) at page 640, paragraph 12.83, the learned authors say:
>
>> Questions of domestic law as opposed to foreign law are not matters upon which a court will receive opinion evidence.
>
> 29 In support of the above proposition, the learned authors refer to the decision of the Ontario Court of Appeal in *R. v. Century 21 Ramos Realty Inc.* (1987), 58 O.R. (2d) 737 at 752, where the Court stated the principle as follows:
>
>> It was a question of law for the judge as to what constitutes an appropriation. It was for the judge to determine, in compliance with the legal definition, if and when an appropriation took place. This was not something on which an expert witness could give evidence.
>
> 30 Consequently, it was wrong for the Judge to rely, even if only in part, on the opinion of Ms. Ashenbrenner with respect to whether the Agreement was enforceable or whether the appellant was bound by its terms.

[27] As noted by the Federal Court judge the Abacus memo is comprised almost exclusively of opinions on the legal effects of the transactions. There are no opinions on foreign law in the Abacus memo. The legal implications of the transactions are matters for the Court to determine. Whether a particular section of a taxing statute will apply or how it will apply is not a matter that is to be determined based on opinion evidence presented during a hearing. Therefore, in my view, there is no loss of evidence if the Abacus memo is not disclosed. There is only a loss of an inadmissible opinion on the legal implications of the transactions. The parties would each have the opportunity to argue at a particular hearing how the various provisions of the applicable taxing statutes will apply.

B. *The Giesel Article and the Ambac Decision*

[28] The Federal Court judge relied heavily on the Giesel article and the *Ambac* decision. The Federal Court judge referred to either the Giesel article or the *Ambac* decision in paragraphs 10, 21 – 26, 28, 77, 93, 95, 98, 100, 103, 106, 107, 109, 110, 117, 119, 126, 128, 130, 131, 136, 145, 149, 155, 162, 174, 175, 177 – 180, 196, 197, 200 – 205, 211, 212, 216, 219, 221, 225, 226, 231, 234, 235, 246 – 248, 250, 254, 257, 277, and 286 of his reasons. The large number of references to the Giesel article or the *Ambac* decision illustrate the importance of this article and this case to his decision. Both the Giesel article and the majority of the judges of the New York Court of Appeals in *Ambac* reject the application of common interest privilege in commercial transactions.

[29] However, as provided in paragraph 231.7(1)(*b*) of the *Income Tax Act*, the Requirements do not apply to a document that is protected from disclosure by solicitor-client privilege as defined in subsection 232(1) of that Act. This definition is as follows:

> ***solicitor-client privilege*** means the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except that for the purposes of this section an accounting record of a lawyer, including any supporting voucher or cheque, shall be deemed not to be such a communication.
>
> (emphasis added)

[30] In this case, the only provinces that were identified as being potential provinces for the purposes of this definition of solicitor-client privilege were Alberta and British Columbia. Therefore, the question is whether a superior court in Alberta or British Columbia would find that the Abacus memo is protected from disclosure by solicitor-client privilege. The question is not whether the New York Court of Appeals or the court of any other state in the United States would find that the Abacus memo was protected from disclosure by solicitor-client privilege.

[31] The Federal Court judge's stated reasons for finding that common interest privilege is not a valid constituent form of solicitor-client privilege in paragraph 298 of his reasons are, to a large extent, general statements of policy. However, the issue in this case is whether under the law applicable in British Columbia and Alberta, the Abacus memo would be subject to solicitor-client privilege. The issue is not what, in the opinion of the Federal Court judge, the law should be based on certain policy concerns as identified by him.

[32] In *Maximum Ventures* the British Columbia Court of Appeal stated that:

> 14 Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications, including those shared in furtherance of a common commercial interest. In the instant case the McEwan draft was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them. In my view, the ambit of the common interest privilege is aptly summarized in the Sopinka on evidence 2d ed., Supp. of 2004 @ p. 133 which cites the case of *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747, 2003 FCT 214 quoted by the chambers judge at para. 31 of his reasons. Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.

[33] In *Maximum Ventures*, the opinion was first prepared by one lawyer and then shared with persons who were not his client. The British Columbia Court of Appeal adopted the Chambers judge's description of the interest of the parties with whom the opinion was shared as "an ongoing interest in completing the transaction which the disclosure was designed to facilitate" and then found that this interest "is a sufficient common interest to support the extension of the privilege" (*Maximum Ventures* at para. 16). In the present case, different versions of the Abacus memo were shared between the lawyers and their clients and the Abacus memo was finalized based on input from both lawyers. The preparation of one opinion based on input from lawyers representing the different parties to the transactions is not sufficient to distinguish this case from *Maximum Ventures*. In each case (*Maximum Ventures* and this case) the opinions provided by a lawyer to his or her client are shared with other persons who have a common interest in the transactions.

[34] In my view, based on *Maximum Ventures*, the disclosure of the Abacus memo to the other parties to the proposed transaction would not result in a finding that privilege had been waived. Communication of the Abacus memo was strictly limited to the other parties to the transaction and their counsel and therefore remained confidential.

[35] In *Fraser Milner Casgrain LLP v. Minister of National Revenue*, 2002 BCSC 1344, 2003 D.T.C. 5048 (*Fraser Milner Casgrain LLP*), the British Columbia Supreme Court held that the documents disclosed by Fraser Milner Casgrain to persons who were not their clients but who were interested in completing certain transactions with their clients retained their status as privileged. The Court referred to the cases that were relied upon by Fraser Milner Casgrain (the petitioners):

> 7 The petitioners maintain the privilege attached to the documentation was not waived when it was disclosed to Group B because the disclosure was made to facilitate the common interest the two groups of companies shared in having the transaction successfully completed. They rely on *Archean Energy Ltd. v. Canada (MNR)* (1997), 202 A.R. 198 (Alta. Q.B.), *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, [1998] 10 W.W.R. 633 (Alta. Q.B.) and *St. Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361 (T.D.).
>
> 8 In *Archean Energy*, legal opinions concerning the tax consequences of a number of share purchases were developed for one company which subsequently provided them to a second company, the purchaser in the transactions. The opinions were held, on application by the purchaser under the *Income Tax Act*, to be privileged because they had been provided to further the common interest of having the transaction concluded and not with the intent of waiving the privilege attached. In *Anderson Exploration*, two corporations exchanged confidential documents of a proprietary nature in negotiating a merger. A legal opinion obtained by one was also given to the other. Later, in unrelated litigation involving a subsidiary of one of the corporations, the plaintiff sought access to the documents arising from the merger negotiations. The court held that the disclosure of the documents to third parties did not waive the privilege that attached to all of the documentation because of the common interest associated with their disclosure. And in *St. Joseph*, legal opinions exchanged in the course of a commercial transaction were held to be privileged given that the parties had a joint interest in ensuring its completion.

[36] Two of the cases referred to above were from Alberta. Therefore, there is no distinction between the law of Alberta and British Columbia in relation to the issue of common interest privilege.

[37] The Federal Court in *Pitney Bowes of Canada Ltd. v. Her Majesty the Queen*, 2003 FCT 214, 225 D.L.R. (4th) 747 relied on *Fraser Milner Casgrain LLP* in finding that certain opinions that were shared with other parties who had an interest in certain transactions remained privileged.

[38] The existence of common interest privilege is also recognized in *Sopinka, Lederman & Bryant: The Law of Evidence*, 4th ed. by Lederman, Bryant & Fuerst, (Markham, Ontario: LexisNexis Canada Inc., 2014), at page 975:

> §14.156 There may well be “common interest privilege” available in circumstances where no litigation is in existence or even contemplated. In commercial transactions, legal opinions are often disclosed and shared among various parties to the transaction who all have a common interest in the successful completion of the transaction. In certain commercial transactions, this sharing of opinions is for the purpose of putting the parties on an equal footing during negotiations and in that sense the opinions are for the benefit of multiple parties even though the opinions may have been prepared for a single client. The parties in those circumstances would expect that the opinions would remain confidential as against outsiders and that mere disclosure in that context would not necessarily result in the privileged status of the legal opinions being lost.

[39] The cases cited for this proposition are *Maximum Ventures* and *Pitney Bowes*.

[40] These cases and the commentary in *The Law of Evidence* reinforce the conclusion of the Federal Court judge that common interest privilege "is strongly implanted in Canadian law and indeed around the common-law world" and in particular in Alberta and British Columbia which are the relevant provinces for the definition of solicitor-client privilege in subsection 232(1) of the *Income Tax Act*, in this case. It was therefore not appropriate for the Federal Court judge to rely on the decision of the New York Court of Appeals to effectively overturn the decisions of the Alberta and British Columbia courts.

[41] Based on the decisions of the courts in Alberta and British Columbia, solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.

[42] As noted above, when dealing with complex statutes such as the *Income Tax Act*, sharing of opinions may well lead to efficiencies in completing the transactions and the clients may well be better served as the application of the *Income Tax Act* will be of interest to all of the parties to the series of transactions. In my view, in the circumstances of this case, Abacus and Gillis had sufficient common interest in the transactions to warrant a finding that, in Alberta or British Columbia, the Abacus memo is protected from disclosure by solicitor-client privilege.

V. Conclusion

[43] As a result, I would allow the appeal and set aside the judgment of the Federal Court, with costs here and in the Federal Court. Issuing the judgment that the Federal Court should have rendered, I would dismiss the application of the Minister to enforce the Requirements as they relate to the Abacus memo.

"Wyman W. Webb"
J.A.

“I agree
Richard Boivin J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT, DATED DECEMBER 7, 2016, DOCKET NUMBER T-126-15, CITATION NUMBER 2016 FC 1352

DOCKET:	A-465-16
STYLE OF CAUSE:	IGGILLIS HOLDINGS INC. ET AL. v. THE MINISTER OF NATIONAL REVENUE AND ABACUS CAPITAL CORPORATIONS MERGERS AND ACQUISITIONS ET AL.
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	OCTOBER 2, 2017
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	BOIVIN J.A. RENNIE J.A.
DATED:	MARCH 6, 2018

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