

Common Interest Privilege in Peril

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A recent decision of the Federal Court in *Minister of National Revenue v. Iggillis Holdings Inc.*, 2016 FC 1352, may have critical implications for the scope of common interest privilege in the commercial context. If this decision is upheld on appeal, parties to a commercial transaction or other arrangement will have to revisit their practices and may no longer wish to share privileged communications in this context unless they are represented by the same law firm.

Common interest privilege operates, in limited circumstances, to negate the waiver of privilege that would otherwise occur when a privileged communication is shared with a third party. Prior to *Iggillis*, there had been widespread acceptance that parties to commercial transactions have entirely legitimate objectives in seeking to evaluate a particular legal risk applicable to, or affecting, a counterparty through a review of privileged materials. Where parties have shared a common interest in getting the deal done, both federal and provincial 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 The Federal Court's decision in *Iggillis* rejects all of the previous decisions and, in turn, casts significant doubt on this practice.

In *Iggillis*, the Canada Revenue Agency (CRA) was seeking disclosure of a legal memorandum prepared in the course of certain commercial transactions. The memo had been prepared by counsel to the purchaser to discuss the tax issues arising from the proposed transactions, and described a series of steps to permit the transactions to be completed on the most tax efficient basis to both parties. The purchaser's counsel circulated the memo to the vendors' counsel to ensure that vendors understood the steps to be undertaken, and the associated tax and legal risks. It was therefore useful in advancing negotiations but would also, if disclosed, provide the CRA with a "road map" of possible arguments to challenge the parties' tax position. The Court found that the memo was subject to solicitor-client privilege, but held that the privilege had been waived when it was shared with vendors' counsel.

In the Court's view, the sharing of privileged communications in furtherance of commercial dealings (referred to as "advisory common interest privilege") essentially serves only two purposes, neither of which was worth protecting: first, it enables transactions that anticipate litigation; second, it affords the litigant with a significant strategic advantage by denying opposing parties and the Court access to evidence. The Court ultimately concluded that any

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

advantages associated with advancing commercial transactions are outweighed by the costs to the administration of justice. Thus, the Court determined that the prior jurisprudence had relied on the "false" policy rationale of fostering commercial transactions, and was no longer good law.

As it stands, the Federal Court's decision places significant restrictions on the ability of parties to share privileged materials. It 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, that is, where all of the parties to the transaction are represented by the same counsel or firm. Privilege over the legal advice of "allied lawyers" whether in relation to a proposed transaction directly or in relation to a previously existing issue (such as pre-existing 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 challenging to resist production to the CRA, regulators or third parties on the basis of common interest privilege.

The decision in *Iggillis* conflicts with a number of other decisions, including previous decisions of the Tax Court and the Federal Court itself (see, for example, *Imperial Tobacco Canada Limited v. HMQ*, 2013 TCC 144 and *Pitney Bowes of Canada Ltd. v. Canada*, 2003 FCT 214). It is also inconsistent with the prevailing Superior Court jurisprudence in a number of provinces (see for example *Trillium Motor World v. General Motors et. al.*, 2014 ONSC 1338, aff'd 2014 ONSC 4894).

Iggillis is not binding on any of the provincial Superior Courts and, in any event, has been appealed to the Federal Court of Appeal. The Federation of Law Societies and the Canadian Bar Association have also sought leave to intervene in the proceedings before the Federal Court of Appeal. However, until that Court weighs in, the status of advisory common interest privilege in the transactional context remains uncertain. As such, parties to commercial transactions should consider the risk of waiver, both with respect to future civil litigation and subsequent dealings with the tax authorities, and may wish to take the more conservative approach required by *Iggillis*, regardless of what might previously have been considered permissible.

At the core of the Federal Court's decision in *Iggillis* was the conclusion that the benefits associated with protecting privileged communications that are disclosed in the context of a potential commercial transaction were speculative, while the cost to the administration of justice was obvious (namely, the suppression of relevant documents that the opposing party in a dispute or litigation context – in this case, the CRA – might otherwise seek to access). It is telling in this regard that the Court found that common interest privilege would "enable" commercial transactions that are of "questionable legality" given the purposes to which they are put, and cited the following examples in support of this conclusion: "placing wealth off shore, or estate planning of wealthy persons, or multinational corporations shifting their costs to high-tax countries and their profits to low-tax countries."

These conclusions have attracted considerable attention from commentators, who have argued that there are perfectly legitimate reasons to share privileged communications in the context of a proposed transaction, offshore or otherwise. If, as a result of this decision, that practice has to cease, it may impose a significant impediment to the execution of transactions going forward, with no corresponding benefit to the administration of justice (since parties will preserve privilege by not sharing privileged communications). It is hoped that these concerns will be fully considered by the Federal Court of Appeal.