

Canadian Appeals Court Reaffirms Common Interest Privilege

by Steve Suarez

Reprinted from *Tax Notes International*, April 2, 2018, p. 221

Canadian Appeals Court Reaffirms Common Interest Privilege

by Steve Suarez



Steve Suarez

Steve Suarez is with Borden Ladner Gervais LLP in Toronto.

In this article, the author discusses the Canadian Federal Court of Appeal's *Iggillis* judgment, which restored the status of "common interest privilege" amongst lawyers and their clients and blocked the Canada

Revenue Agency's attempts to expand its ability to gather taxpayer information.

On March 6, Canada's Federal Court of Appeal (FCA) rendered a very important decision in a case (*Iggillis Holdings Inc. and Ian Gillis v. Minister of National Revenue*, 2018 FCA 51) relating to the scope of lawyer-client privilege in Canada. In finding for the taxpayers and overturning a lower court decision that had seriously curtailed an important element of lawyer-client privilege, the FCA has restored the status of "common interest privilege" that arises when two parties share confidential legal advice.

The *Iggillis* case is noteworthy for various reasons. To begin with, the actions of the Canada Revenue Agency in demanding the taxpayer documents in question and going to court to try to enforce production show (yet again) the relentless determination of Canadian tax authorities to expand the outer limits of their legal authority to obtain taxpayer communications under the Income Tax Act (Canada). This case is merely one of a series of recent cases in which the CRA has sought to move the goal posts in the exercise of its information-gathering powers beyond both established practice and what the text of the ITA

allows. Once again, the FCA has been forced to step in and push back in a situation that should never have progressed as far as it did. Moreover, the result demonstrates the importance of lawyer-client privilege in dealing with Canadian tax authorities. It is the one substantive refuge from the voracious appetite of the CRA for taxpayer information (often subjective analysis rather than simple facts and documents) that the courts will consistently protect.

The Law of Privilege in Canada

To understand what was at stake in *Iggillis* and the importance of the FCA's decision, it is helpful to briefly review Canadian lawyer-client privilege law. There are two main types of lawyer-client privilege in Canada that protect information and documents from disclosure: solicitor-client privilege and litigation privilege. In its online reference resource pertaining to taxpayer information,¹ the CRA acknowledges that it "cannot compel production of material that is subject to solicitor-client privilege or litigation privilege." As there are very few other grounds of practical significance available to taxpayers for refusing to provide the CRA with information or documents that it demands, and as the courts in Canada (including those dealing with tax matters) have generally been very assertive in preserving the sanctity of lawyer-client privilege as a fundamental element of the Canadian justice

¹ Government of Canada, "Acquiring Information From Taxpayers, Registrants and Third Parties" (2015).

Lawyer-Client Privilege in Canada: Summary

	Solicitor-Client Privilege	Litigation Privilege
Purpose	Allow candid discussion of legal rights and obligations (protects <i>relationship</i>).	Allow investigation and preparation of case for litigation (protects <i>process</i>).
Requirements	Communication/document: <ul style="list-style-type: none"> • made between a lawyer and the lawyer's client; • intended to be confidential; and • made for the purpose of seeking or giving legal advice. 	Communication/document: <ul style="list-style-type: none"> • made in the course of or in anticipation of litigation; and • made for the dominant purpose of that litigation.
Duration	Indefinite.	Until conclusion of litigation (including related litigation).
Third party communications may be included	Only if third party acting as agent of client/lawyer in obtaining or delivering lawyer's legal advice.	Yes if otherwise meeting litigation privilege requirements.

system,² lawyer-client privilege is critically important in dealing with tax authorities.³

Lawyer-Client Privilege in Canada: Summary

Solicitor-Client Privilege

Solicitor-client privilege generally protects confidential communications between a lawyer and a client that directly relate to the seeking, formulating, or giving of legal advice (for example, in a tax context, verbal discussions, tax planning memoranda, diligence reports, and opinions). There are three essential elements to the creation of solicitor-client privilege (sometimes called “legal advice privilege”) to protect a communication from disclosure:

- the communication must be between a lawyer and a client with whom the lawyer

has a professional relationship — that is, the lawyer must be acting for the client;⁴

- the communication must be intended by the parties to be confidential; and
- the purpose of the communication must be the seeking or giving of legal advice (not other matters, such as business advice).

The scope of the privilege does not extend to communications: (1) when legal advice is not being sought or offered; (2) that are not intended to be confidential; or (3) that are made for the purpose of furthering unlawful conduct. The privilege belongs to the client, and continues after the solicitor-client relationship ends. Unlike in the United States, there is no concept of “tax preparer privilege” or other privilege for accountants or other non-lawyers. The basic rule is that communications between taxpayers and non-lawyers, and the work product of non-lawyers (for example, verbal discussions, memoranda, tax provision working papers, opinions, etc.), will be exposed to disclosure to tax authorities.

Canadian law accepts that communications “between a lawyer and client” may include a third party acting as an agent for either the lawyer or the client. For example, an accountant retained (1) by a client to seek the lawyer’s advice or (2) by a lawyer to assist in rendering the lawyer’s legal

² See, e.g., the Supreme Court of Canada in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para. 26: “The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients’ cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.”

³ The law of privilege in Canada in a tax context is reviewed in greater detail in Steve Suarez, “Canada Revenue Agency Forces Taxpayer to Disclose Discussions with Accountant,” *Tax Notes Int’l*, May 11, 2015, p. 553.

⁴ The lawyer may be in-house counsel, so long as she is acting in that role and providing legal advice.

advice, may be included within the scope of the solicitor-client privilege in appropriate circumstances:

- when the accountant is acting as a conduit or messenger in passing information between the lawyer and client that would otherwise have been privileged had it been passed directly from lawyer to client; or
- when the accountant's role extends to a function which is essential to the existence or operation of the client-solicitor relationship, in which case "the privilege should cover any communications that are in furtherance of that function and that meet the criteria for client-solicitor privilege."⁵

While the exact scope of this third-party exception is not clear, the essential element remains that of the third party facilitating the giving or seeking of legal advice by a lawyer to a client (for example, where the third party's work product is a necessary input required by the lawyer to provide the lawyer's legal advice), rather than independently providing advice of some kind to the lawyer's client.

Litigation Privilege

Litigation privilege focuses less on the relationship between the lawyer and client and more on the process of litigation. Its purpose is to facilitate the litigation process by creating "a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate."⁶ For litigation privilege to attach to a communication or document, the communication must be made or the document must be created:

- during or in anticipation of litigation; and
- for the *dominant* purpose of preparing for such actual or reasonably anticipated litigation.

Litigation privilege is not restricted to communications between the lawyer and client

(or their respective agents), and an expectation of confidentiality is not a prerequisite (for example, interviews with witnesses who are expected to later testify may still be privileged). It applies only as against the other parties to the particular litigation (not as against the world generally, like solicitor-client privilege), and it ends once the litigation is over and no related litigation is anticipated.

Waiver

Lawyer-client privilege, once established, may be lost if privilege has been "waived." The basic concept is that conscious disclosure of otherwise privileged material to a third party will result in waiver of the privilege, which may be express or (in some cases) implied. There are many important limitations on what constitutes a "waiver" of privilege, however:

- a disclosure made by another without the client's consent has been held not to constitute a waiver of privilege;
- the doctrine of "limited waiver" allows a corporation to disclose otherwise privileged documents to its external auditors under applicable corporate law, without such disclosure constituting a waiver of privilege as against the rest of the world;
- in some cases no waiver has been found to occur by virtue of an inadvertent disclosure by a third party (for example, an accounting firm) where the client had not acted carelessly and had quickly moved to assert privilege upon becoming aware of the disclosure; and
- finally, where privileged materials have been generated by or shared between two parties with a "common interest" toward a shared objective (for example, completion of a business transaction, mounting a joint defense, or the sharing of materials within a corporate group) and on a confidential basis, it has been determined that no waiver occurs, under the doctrine of "common interest privilege" (CIP).⁷

⁵ *General Accident Insurance Company v. Chrusz*, 1999 CanLII 7320 (Ont. CA). For example, a tax lawyer might retain an accountant to perform some function (for example, preparing a report) that the lawyer can in turn use as an input in formulating and delivering legal advice to the client.

⁶ Robert J. Sharpe, "Claiming Privilege in the Discovery Process," in *Special Lectures of the Law Society of Upper Canada* 163 (1984), at 164-65, as cited in *Blank*, *supra* note 2 at para. 28.

⁷ CIP (sometimes called "deal privilege" when arising on a commercial transaction) is more properly thought of as a non-waiver of previously established lawyer-client privilege, rather than as a distinct form of privilege itself.

The justification for maintaining privilege in the context of commercial transactions is ensuring that the transactions can be completed in a practical and efficient manner.⁸ The *Iggillis* case dealt with CIP in a tax context.

Iggillis

The facts of the *Iggillis* case are relatively straightforward. The taxpayers (collectively “*Iggillis*”) were the vendors of shares in a transaction structured in an apparently tax-efficient manner largely by the purchaser but with significant input from *Iggillis*’s tax counsel. The purchaser and *Iggillis* were represented by separate tax counsel, whose planning discussions culminated in a memorandum authored by *Iggillis*’s counsel and shared with the purchaser and its counsel, describing the steps of the relevant series of transactions (of which the actual purchase and sale of shares were part) and counsels’ view as to the tax implications of these steps. The steps themselves (that is, the actual transactions undertaken) were clearly not protected from disclosure under solicitor-client privilege, but the lawyers’ views as to the likely tax consequences of those steps came within the scope of legal advice protected by solicitor-client privilege.

The CRA demanded that the taxpayers turn over the memorandum, serving upon them formal requirements under subsection 231.2(1) ITA. The taxpayers refused, forcing the CRA to apply before a judge of the Federal Court of Canada to seek a compliance order under subsection 231.7(1) ITA requiring the taxpayers to hand over the memorandum.

Federal Court

The federal court judge found in favor of the CRA and issued the requirement order being sought. In a lengthy decision,⁹ Justice Annis

concluded that the contents of the memorandum indeed consisted of legal advice that *prima facie* met the requirements for protection from disclosure under solicitor-client privilege.

However, despite agreeing with the taxpayers that “CIP in transactional circumstances is strongly implanted in Canadian law and indeed around the common-law world,” Justice Annis decided that in his view, CIP in the context of solicitor-client privilege (referred to as “advisory CIP”) should not be recognized as a defense to waiver except where two clients share the same lawyer (so-called joint client privilege).¹⁰ Rather, CIP should essentially be limited to litigation privilege, notwithstanding the court’s acknowledgement of “an overwhelming acceptance of advisory CIP in the common law world, except in thirteen states of the United States of America,” on the basis that “the jurisprudence supporting advisory CIP was established under a cloak of confusion with common interests in [joint client privilege] and litigation privilege and with very little analysis of the factors and considerations relating to the legitimacy of advisory CIP.”¹¹

The rationale for the court’s decision essentially consisted of an article by U.S. law school professor Grace M. Giesel¹² claiming that CIP in general should be struck down on the basis that its societal costs outweigh its benefits; and a recent decision of the New York Court of Appeals¹³ that limited CIP to litigation-related circumstances. In a lengthy and somewhat baffling judgment “the impetus for [which]” Justice Annis acknowledged was the Giesel article, the court concluded that:

- CIP should not be accepted as a legally valid defense to waiver of solicitor-client privilege (as opposed to litigation privilege), on the basis that it is fundamentally incompatible with the basic tenets of solicitor-client privilege and results in greater costs to

⁸ See, e.g., *Fraser Milner Casgrain LLP v. M.N.R.*, 2003 DTC 5048 (B.C.S.C.): “[T]he economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.”

⁹ *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2016 FC 1352.

¹⁰ Paras. 91 and 92.

¹¹ Paras. 133 and 134.

¹² Grace M. Giesel, “End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting” 95(2) *Marq. L Rev* 475 (2011) (herein, the “Giesel article”).

¹³ *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 27 N.Y.3d 616 (2016).

society than any benefits it provides (in particular depriving the courts of potentially important information);

- prior Canadian jurisprudence accepting CIP as a defense to waiver of solicitor-client privilege should be disregarded as being based on “unsound jurisprudence from other Canadian and American courts that relied on the false external policy factor of advisory CIP fostering commercial transactions and unsupportable expectations of confidentiality”; and
- the CRA should be granted its order forcing the taxpayers to turn over the memorandum.

Federal Court of Appeal

The FCA’s decision overturning Justice Annis’s judgment is concise, to the point, and well grounded in the law. Fundamentally, the court found that Justice Annis had embarked on an exercise of deciding what he thought the law should be, rather than what it is:

[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.

The FCA briefly reviewed some of the relevant Canadian authorities on the application of CIP to cases of solicitor-client privilege and found them to be both clearly good law and readily applicable to the situation in *Iggillis*. More specifically, the relevant text of the ITA dealing with privilege concerns itself with whether the documents in question would be privileged under the laws of the relevant provinces of Canada (not the courts of New York), which they clearly would be in this case:

[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.

As such, “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.”

The FCA also dismissed Justice Annis’s public policy concern that the application of CIP as a waiver to solicitor-client privilege would result in the courts not seeing relevant evidence. Justice Webb observed that the memorandum consisted of two lawyers’ opinions as to the consequences under the ITA of the relevant transactions, those legal consequences ultimately being for the courts to decide should the matter proceed to litigation. In that event, both the taxpayers and the CRA would be able to make whatever legal arguments they wished before the courts on the legal consequences of the transactions in question, and in finding the memorandum to be privileged the CRA is not being deprived of any evidence that would prevent it from so doing. Rather, the FCA observed that “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.” Thus, the FCA found the memorandum to be protected from disclosure under solicitor-client privilege, allowed the taxpayers’ appeal, set aside the lower court judgment, and dismissed the CRA’s application for a requirement order.

Implications

The FCA's decision to overturn the lower court and refuse the CRA its requirement order is a very welcome development. The lower court judgment was simply not sustainable under the law of privilege in Canada, and had that judgment remained undisturbed it would have set a very negative precedent and left the status of CIP under provincial law completely at odds with its status before the federal courts. It is now clear that no such difference in federal and provincial law exists regarding CIP, and in fact the FCA judgment will serve as a powerful statement of how "strongly implanted in Canadian law" CIP is.

More broadly, *Iggillis* is but one of a series of cases in the past few years demonstrating how aggressively the CRA has been pursuing taxpayer information and documentation. Recent disputes that have gone so far as to require adjudication before the courts include:

- the CRA's attempt to use its information-gathering powers to compel a taxpayer to turn over its list of uncertain tax positions in a manner inconsistent with the CRA's own publicly stated administrative policy, simply because providing it with such an "audit road map" would make audits easier for the CRA as a general matter;¹⁴ and
- demands for oral interrogations of 25 named employees of the taxpayer and its affiliates by CRA auditors, in the context of disputing the same issues for the same taxpayer already in litigation with the CRA as regards earlier years (the litigation process having much more stringent procedural safeguards on information gathering than on an audit).¹⁵

These and other cases (which represent only those situations where the taxpayer has had the resources and the fortitude to litigate rather than submit) reveal a disheartening trend of Canadian

tax authorities pushing the boundaries of their statutory powers. Cases such as *Iggillis* constitute administrative overreach that should never have been attempted in an area where the law was already clear, much less pursued in court (and much less requiring appellate-level intervention to achieve the correct result). They represent efforts to go beyond clearly defined limits on the CRA's ability to obtain taxpayer documentation that have been well established in the jurisprudence for many years.

The CRA appears to be increasingly willing to "take a shot" at obtaining access to taxpayer materials in a way that goes beyond both a reasonable interpretation of the ITA and established practice as to what constitutes fair play, knowing that the cost of pursuing a defense in court is prohibitively expensive for most taxpayers. While the FCA's decision to restore order is welcome, the cold reality is that the tax system is simply not a level playing field when tax authorities push the envelope of their powers. The CRA's resources are virtually limitless relative to those of taxpayers, and the CRA has repeatedly demonstrated that it is willing to litigate particular cases to establish legal precedents that will be useful to it in dealing with other taxpayers. As such, the CRA has an enormous litigation advantage in terms of resources and benefits that makes going to court over demands for information a practical alternative for very few taxpayers. For the vast majority of taxpayers, going to court against the CRA is about as level a playing field as stepping into the ring against a professional boxer.

What is particularly noticeable lately is how aggressive the CRA is in going after taxpayers' subjective analysis. No reasonable person disputes that tax authorities need fair and timely access to factual information, transactional documents, and similar materials that are properly required to conduct an audit. The CRA's job is to review such materials and form an independent judgment as to whether the tax consequences under the law result in more taxes owed than the taxpayer has reported on its tax return.

Increasingly however, Canadian tax authorities are aggressively using their legal authority to demand what are purely subjective

¹⁴ See Suarez, "Canadian Appeals Court Denies CRA Demand for Taxpayer's UTP List," *Tax Notes Int'l*, Apr. 24, 2017, p. 288; and "Canada Revenue Agency Declares Open Season on Taxpayer Information," *Tax Notes Int'l*, July 13, 2015, p. 143.

¹⁵ Suarez, "Canada Revenue Agency's Demand for Oral Interviews of Taxpayer's Employees Refused by Court," *Tax Notes Int'l*, Aug. 28, 2017, p. 901.

opinions and analyses that do not in any way affect how much tax is owed under the law, but rather simply constitute someone's views on that legal question. The CRA publicly states that in reviewing any information or documentation obtained during an audit, "Officials will not be influenced by any subjective analyses, comments or opinions contained in the information or documentation reviewed."¹⁶ One might therefore be forgiven for wondering why such heroic efforts are being made to force production of materials that contain *nothing but* such subjective analyses, particularly (as in the *Iggillis* case) in the face of what is settled law. While all of us appreciate things that make our jobs easier, those empowered by statute to compel information and documentation from others in support of tax audits have an obligation to stay within the reasonable limits of that authority and use their ample resources to obtain the relevant facts and transaction documents and then do their own analysis as to the legal consequences. Stretching the limits of those legislative powers to try to

obtain an audit "roadmap" (to use the wording from the *BP Canada* case (*BP Canada Energy Co. v. Minister of National Revenue*, 2017 FCA 61 (2017), *rev'g* 2015 FC 714 (2015)) does the tax system no credit.

Ultimately, what *Iggillis* makes clear is the importance within a tax setting of creating, maintaining, and asserting lawyer-client privilege wherever reasonably possible. It is particularly valuable in the tax-planning context, as it allows a taxpayer the ability to obtain a full and candid assessment of the strengths and weaknesses of different tax-planning alternatives without fear of that advice ultimately being disclosed to tax authorities. Such matters should be structured to come within the scope of the privilege wherever possible and clearly identified as being privileged. The potential for inadvertent waiver should be minimized by restricting circulation of privileged materials and clearly identifying situations in which disclosure is being made on the basis of limited waiver or CIP. Put simply, from a practical perspective, lawyer-client privilege is the only refuge that taxpayers can rely on the courts to uphold for protecting sensitive communications and legal analyses. ■

¹⁶ *Supra* note 1.