Federal Court Of Appeal Reaffirms The Validity Of Transactional Common Interest Privilege

March 15, 2018

Iggillis Holdings Inc. v Canada (National Revenue)

A collective sigh of relief reverberated across the tax and corporate law bar when, on March 6, 2018, the Federal Court of Appeal released its reasons in *Iggillis Holdings Inc. v Canada (National Revenue)*,[1] confirming the availability of common interest privilege in the context of a commercial transaction.

Common Interest Privilege in Commercial Transactions

"Common interest privilege" is not a free-standing category of privilege. Rather, it is an exception to the general rule that privilege is forfeited when an otherwise privileged communication is shared with a third party. This exception to the doctrine of waiver applies when one party discloses information that is subject to solicitor-client privilege to another party (or parties) who have a common interest in a legal matter. In the context of a commercial transaction, common interest privilege allows parties to share privileged information (*e.g.*, legal opinions) without waiving the privilege that otherwise attaches to that information, provided that:

- The parties intended that the information being shared would remain confidential from outsiders;
- The parties have a common interest in completing the transaction; and
- The exchange of the otherwise privileged communications was done to advance that common interest.

Although a well-entrenched part of Canadian law, common interest privilege is not recognized in all jurisdictions.

The IGGillis Memorandum and the Federal Court Decision

Abacus Capital Corporations Mergers and Acquisitions ("Abacus") structured a series of transactions by which an Abacus entity would acquire shares of a corporation held by Ian Gillis and IGGillis Holdings Inc. ("IGGillis").

Abacus and IGGillis each retained legal counsel. With support and input from counsel for IGGillis, counsel for Abacus prepared a memorandum (the "Memo") outlining the transaction steps and the resulting tax implications. The Memo was sent to both Abacus and Mr. Gillis.

Following the completion of the transactions, the Minister of National Revenue (the "Minister") served IGGillis with requirements to produce the Memo under subsection 231.2(1) of the *Income Tax Act*.

While the Federal Court held that the Memo was subject to solicitor-client privilege, that Abacus and IGGillis had a common interest with respect to the subject matter of the Memo (*i.e.*, reduction of tax and completion of the transactions), and that transactional common interest privilege is widely recognized in Canada, the Federal Court concluded that common interest privilege is not valid in circumstances other than litigation. On that basis, the Federal Court held that the sharing of the privileged Memo between the parties resulted in a waiver of privilege. The Federal Court based its decision on U.S. case law[2] and an academic article by published in the Marquette Law Review,[3] ruling that common interest privilege was "not a valid component" of solicitor-client privilege and was irreconcilable with the underlying rationale for solicitor-client privilege.

Federal Court of Appeal Decision and Analysis

In a unanimous decision, the Federal Court of Appeal agreed that the Memo was privileged by solicitor-client privilege, subject only to the question of whether that privilege had been waived when it was shared with a non-client. The fact that one Memo was prepared with input from both lawyers did not change the analytical framework.

First, the Federal Court of Appeal rejected the Federal Court's finding that maintaining privilege over the memo would deprive the Court of evidence necessary to resolve the dispute, on the basis that a legal opinion as to domestic law is not admissible evidence in any event. Issues of Canadian law are for the court to determine, and are not facts to be proven through the admission of evidence. The correct interpretation of the law may be the subject of submissions, but is not an evidentiary matter.

Second, the Federal Court of Appeal reviewed the definition of "solicitor-client privilege" in subsection 232(1) of the *Income Tax Act* (Canada)[4] and noted that privilege refers to the right, if any, that a person has "in a superior court in the province where the matter arises" to refuse to disclose a communication between the person and his/her lawyer. In *Iggillis*, the relevant provinces were Alberta and British Columbia. The Federal Court of Appeal held that the proper question was therefore whether the Memo was privileged under the laws of those provinces, rather than what the law should be based on the policy concerns of the Federal Court judge. On this issue, the Federal Court of Appeal accepted that where privileged communications are shared on a confidential basis with a party with a sufficient common interest in the same transaction, privilege will not be waived.

Finally, the Federal Court of Appeal noted that clients may be better served when dealing with complex statutes such as the *Income Tax Act* if their counsel are able to work collaboratively in furtherance of completing transactions in which the parties have a sufficient common interest.

Takeaways

The Federal Court of Appeal's decision in *Iggillis* has ended the uncertainty surrounding the ability to share privileged communications with other parties to a transaction or contemplated transaction, and reaffirmed the status of transactional common interest privilege as "strongly implanted in Canadian law." The decision does not eliminate the need for caution in the disclosure of privileged materials, but confirms that with sufficient intention of confidentiality and common interest, privilege may be maintained, thereby facilitating the efficient planning, negotiation and completion of commercial transactions in Canada. Advice should be sought as to how to maintain privilege if disclosure of privileged communications is contemplated.

While the *Iggillis* decision brings welcome clarity to the transactional context, the question remains as to whether advisory common interest privilege applies in circumstances where neither litigation nor a transaction is contemplated or underway. It remains to be seen whether the policy considerations raised by the Federal Court judge will have any impact in other circumstances.

If you have any questions or require assistance with such matters, please contact any member of BLG's Tax Litigation and Dispute Resolution Group or Commercial Litigation Group.

[1] 2018 FCA 51

[2] In particular, a 2016 judgment of the New York Court of Appeal in *Ambac Assurance Corp. v Countrywide Home Loans Inc.* 36 N.Y.S. 3d 838 (Ct. App., 2016)

[3] Professor Grace M. Giesel, "End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting" (2011) 95 Marq. L. Rev. 475.

[4] RSC 1985 c. 1 (5th Supp.)

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