Supreme Court of Canada Slams the Door on CRA Challenge to Common Interest Privilege

October 25, 2018

Iggillis Holdings Inc. and Ian Gillis v. Minister of National Revenue, 2018 FCA 51

Relevant To: Parties seeking to exchange privileged communications between themselves without losing the protection of lawyer-client privilege

Issue: The Canada Revenue Agency (CRA) sought to obtain confidential legal analysis prepared by and shared between tax lawyers acting for a buyer and a seller (respectively) in a purchase and sale transaction, claiming that "common interest privilege" (being an exception to the general rule that privilege is waived when privileged materials are shared with a third party) does not exist as regards solicitor-client privilege.

On Thursday October 25, the Supreme Court of Canada released its decision on the CRA's application for leave to appeal its loss before the Federal Court of Canada in Iggillis Holdings Inc. and Ian Gillis v. Minister of National Revenue, 2018 FCA 51. The Supreme Court rejected the CRA's application, meaning that it will not hear the CRA's appeal and the Federal Court of Appeal's decision upholding the validity of common interest privilege in Canada is now final. This decision represents another high-level judicial reiteration of the importance of lawyer-client privilege in Canada as a fundamental element of the Canadian justice system, which is especially important in a tax context in terms of preserving one's ability to obtain legal advice on tax matters secure in the knowledge that tax authorities cannot compel disclosure of such confidential communications for use as an audit "road map."

In brief, there are two basic forms of lawyer-client privilege in Canada:

- solicitor-client privilege (sometimes called "legal advice privilege"), applicable to confidential communications between a lawyer and client for the purpose of giving or seeking legal advice; and
- litigation privilege, attaching to communications or documents prepared during or in anticipation of litigation, and for the dominant purpose of preparing for such actual or anticipated litigation.[1]

In Iggillis, the CRA demanded production of a tax planning memorandum prepared by tax counsel for the purchaser of shares in a transaction apparently structured in a tax-efficient manner largely by the purchaser but with significant input from Iggillis's tax counsel. Discussions between counsel resulted in a planning memorandum, describing the proposed planning steps and counsels' views as to the resulting tax implications. Counsels' confidential opinions were clearly protected from disclosure by solicitor-client privilege, and the parties took the position that such privilege was not waived when they shared their analysis with one another in the context of their common goals, but rather was protected by "common interest privilege." When the taxpayers refused to turn over the memorandum, the CRA sought a compliance order from the Federal Court of Canada.

The Federal Court judge agreed with the CRA, concluding (despite acknowledging "an overwhelming acceptance of [common interest privilege as a defence to waiver of solicitor-client privilege] in the common law world, except in thirteen states of the United States of America") that common interest privilege should not be accepted as a legally valid defence to waiver of solicitor-client privilege, largely for public policy reasons. The Federal Court of Appeal strongly disagreed, and overturned the lower court decision on the bases that (1) the lower court judge had rendered his decision based on what he thought the law should be, rather than what the law is, and (2) common interest privilege is in fact "strongly implanted in Canadian law."[2] The Federal Court of Appeal concluded:

". . . 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."

Taxpayers are well-advised to take whatever steps they reasonably can to create, assert and maintain lawyer-privilege in Canada wherever possible, privilege being the only refuge that can practically be relied upon for protecting sensitive communications and legal analysis from overzealous tax authorities. BLG's experts on lawyer-client privilege assist clients in understanding all aspects of this powerful tool for maintaining confidentiality over sensitive legal communications, including performing privilege audits to review the suitability of existing procedures for preserving and maintaining privilege and providing advice on improvements and best practices.

[1] For more on the law of privilege in a Canadian tax context, see "Canadian Appeals Court Reaffirms Common Interest Privilege," Tax Notes International, April 2, 2018, p. 221.

[2] For more on the Court of Appeal's previous decision, see previous BLG Bulletin

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