“In this world nothing can be said to be certain, except death and taxes.” (Benjamin Franklin, 1817). But if you get the right legal advice, you can at least be fairly certain that you’re not paying more tax than you need to. And legal advice (or lawyer-client) privilege means you can be certain that the government won’t be able to compel disclosure of the legal advice you received to do your tax planning. Right? Well, maybe.

Legal advice privilege has always been described as a right of the client. But the client’s ability to claim that right depends on who gave the advice. So far, English and Canadian courts have upheld the traditional rule that, unless the advisor was a lawyer, privilege will not shield the legal advice from scrutiny by the taxing authorities. A January 2013 decision of the highest court in the United Kingdom (referred to as the Prudential case) reflects that the profession of the advisor matters at least as much as the nature of the advice. Given the rationale for legal advice privilege, there’s a good argument that the advisor’s profession should be irrelevant as long as legal advice is given in confidence by a qualified professional. But, until Canadian law changes, clients need to keep in mind that they will only be able to claim legal advice privilege if they involve a lawyer in obtaining the legal advice. Legal advice received directly from accountants is not privileged, no matter how expert in tax law the accountants may be.

PRINCIPLES UNDERLYING LEGAL ADVICE PRIVILEGE

Since the 16th century, the common law has upheld a person’s right to receive legal advice in confidence, whether or not the advice is sought in contemplation of litigation. This right was recognized by the courts as promoting the administration of justice. It was explicitly not tied to any particular importance of the legal profession. In other words, it was the receiving of legal advice in confidence that gave rise to the privilege — not the profession of the advisor. This right has become known as legal advice
privilege or solicitor-client privilege. The Supreme Court of Canada recognizes this privilege as a substantive constitutional right, deserving of the strongest protection. Unless the client waives it, the only two exceptions are public safety and “innocence at stake.”

Originally, the focus of legal advice privilege was whether legal advice was sought and given in confidence: if it was, then it was privileged. Some judges have recognized that the focus on lawyers in the cases dealing with privilege flowed from the historical reality that, in the past, legal advice was generally available only from lawyers. Over time, however, the courts have modified their focus. Instead of focusing on whether the client received legal advice in a confidential, professional advisory context (sometimes known as the functional approach), the determinative issue has become whether it was a lawyer who gave the advice.

**TAX ACCOUNTANTS AND LEGAL ADVICE**

In a dispute with the taxing authorities, it is often to your advantage not to have to disclose the legal advice on which you relied in structuring your affairs. This is why legal advice privilege matters. As observed by one judge in the *Prudential* case:

> Legal advice privilege is sometimes described as essential to the effective administration of justice, … [T]he relevant public interest was in reality the rule of law, which depends upon the citizen being able without inhibition to find out what his legal position is. The complexity of the modern law and its progressive invasion of the interstices of daily life, have made this a public interest of greater importance than ever before. It is perhaps particularly significant in the area of tax law, where the citizen is brought up against the power of the state and the law is often technically complex.

Tax law is complicated, especially if your affairs are complex, or your business is multi-faceted, large or international. Creative, competent tax advice is essential. And these days it is often highly knowledgeable and skilled tax accountants who are the preferred tax advisors.

**THE PRUDENTIAL CASE**

The Prudential group of companies implemented a tax avoidance scheme devised by their tax advisors, PricewaterhouseCoopers. As required by UK legislation, PwC disclosed the scheme to Her Majesty’s Revenue and Customs. A tax inspector served notices on Prudential to obtain disclosure of documents. Prudential disclosed some, but asserted that legal advice privilege protected the rest. The inspector obtained a court order that Prudential disclose the rest. Prudential applied for judicial review of that order. Two levels of court held that the disputed documents would have been subject to privilege had the advice in them been provided by a lawyer, but that “no such privilege extended to advice, even if identical in nature, provided by a professional person who was not a qualified lawyer”.

On final appeal to the UK Supreme Court, five of the court’s seven judges held that, while there were strong arguments in favour of extending legal advice privilege to advice given by non-lawyers, there was an equally strong case for confining the protection to advice given by lawyers. To extend the privilege to non-lawyers would involve uncertainties and unknown consequences. What professions would qualify? What would be characterized as legal advice? The majority was concerned that saying privilege should be extended to advice from professionals “whose profession ordinarily includes the giving of legal advice” did not provide enough clarity with respect to professionals like municipal planners, engineers, surveyors, architects or actuaries, who often have considerable legal expertise, but do not always give legal advice, and who are governed by their own codes and disciplinary procedures.

Though the majority acknowledged there were powerful arguments in favour of extending legal advice privilege to non-lawyers qualified to give legal advice, they ruled that any radical change in the longstanding policy of confining privilege to advice given by lawyers was better left to the UK Parliament, especially in light of recent changes to the UK legal profession itself.

“...a client can rely on legal advice privilege...only if the advice was received from a lawyer.”
Two judges dissented. In their view, there was no principled basis to deny extension of legal advice privilege to non-lawyer professionals who gave legal advice. They emphasized that, properly understood, English common law has always taken the functional approach to privilege: its availability depends on the nature of the advice and the circumstances in which it is given, not the status of the adviser. The dissenting judges did not see this as an area of legal policy where the courts should defer to Parliament. They observed that common law courts are well equipped to develop the law of privilege on a case-by-case basis. This is what the common law courts have always done.

In summary, all seven judges in the *Prudential* case accepted that PwC had given confidential legal advice to the Prudential group. In spite of this, the majority of the court refused to recognize that legal advice privilege protected a client unless the advice was given by a lawyer – even where the client had received legal advice from the professionals best qualified to give it: tax accountants. The result is that, under UK law, a client can rely on legal advice privilege in respect of tax advice only if the advice was received from a lawyer.

**CLOSING THOUGHTS**

In light of the fundamental rationale for legal advice privilege, it is logically inconsistent that the client’s right to claim privilege should depend on the profession of the advisor, rather than on whether the advice is legal, and given in confidence, in a professional, as opposed to social, context. The majority in the *Prudential* case acknowledged this inconsistency.

The Canadian Federal Court of Appeal has taken the same position as the majority in the *Prudential* case. To date, the Supreme Court of Canada has not decided this issue.

The result of this kind of reasoning is that a client’s right to obtain expert legal advice from a qualified professional – the fundamental right that legal advice privilege is supposed to protect – is constrained. To be protected the advice must be from a lawyer, even if another professional is more qualified to give it. Some argue this is an illogical and undesirable result. Some say it is anomalous that if a client communicates directly with an accountant, those communications will not be privileged, but if the client retains a lawyer, who in turn retains an accountant, then the same communications will be privileged.

Not all countries have accepted that only lawyers’ tax law advice should be privileged. In the United States, Congress has amended the *Internal Revenue Code* to extend privilege to some communications with accountants who are ‘federally authorized’ tax practitioners. Given that example, and the strength of both the majority and dissenting reasons in the *Prudential* case, it will be interesting to see whether Canadian law extends legal advice privilege to confidential legal advice given by qualified non-lawyers. In the meantime, taxpayers should retain lawyers (who can then retain tax accountants) to provide confidential tax law advice that will be protected by legal advice privilege.

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On December 27, 2012, the Yukon Court of Appeal (composed of three judges of the BC Court of Appeal) issued its decision in *Ross River Dena Council v Government of Yukon*, concluding that the Yukon has a duty to consult with First Nations before recording a mineral claim. This decision will likely affect free-entry mining regimes across Canada. It could also affect other legislative schemes under which government officials grant interests in Crown lands without exercising any discretion.

Under the *Yukon’s Quartz Mining Act*, a person can acquire a mineral claim by physically staking a claim and recording it. If the person complies with all the statutory requirements, the mining recorder must record the claim. Once the claim is recorded, the person can undertake Class 1 exploration activities on the claim -- including the use of explosives, removal of trees, clearing of trails and removal of subsurface rock -- without further permission or notice.

The Ross River Dena Council applied to the Yukon Supreme Court for a declaration that the Yukon had a duty to consult with First Nations before recording mineral claims. That Court concluded that the Yukon had such a duty and was not meeting it; but could do so by providing post-registration notice of the claims to First Nations. The Council appealed.

The Court of Appeal began its analysis by re-iterating the established test for whether the duty to consult has been triggered:

1. Does the Crown have knowledge, real or constructive, of a potential claim to aboriginal rights or title?
2. Is there contemplated Crown conduct?
3. Can the contemplated Crown conduct adversely affect the claimed aboriginal rights or title?

The parties agreed that the first element was present. The Crown had real knowledge of a claim to aboriginal rights. The Court of Appeal found that the third element was also present. Registration of a mineral claim is not consistent with recognition of aboriginal title. Class 1 exploration activities, while limited, can still affect claimed aboriginal rights or title, in more than a trivial manner.
The key issue was the second element: whether the recording of a mineral claim was “Crown conduct.” The Yukon argued that the mining recorder was not exercising any discretion in recording claims and so there was no Crown conduct to trigger the duty to consult. The Court of Appeal rejected this argument forcefully:

“[37] The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown’s right to manage resources. Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.

[38] The honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land. Far from being an answer to the plaintiff’s claim in this case, the failure of the Crown to provide any discretion in the recording of mineral claims under the Quartz Mining Act regime can be said to be the source of the problem.”

[Emphasis added.]

The Court of Appeal also disagreed with the Yukon Supreme Court that post-registration notice of the recorded claims would be sufficient to discharge the duty to consult. For consultation to be meaningful, it must take place before claimed aboriginal rights are affected.

The Court of Appeal concluded that the legislative design of the Yukon’s mining regime was inadequate, because it did not provide the opportunity for the Crown to discharge its duty to consult. The Court suspended its decision for one year, to allow the Yukon to bring its mining regime into compliance with its duty to consult. This need to change statutory mining regimes to ensure they allow for consultation with First Nations is not unique to the Yukon. In response to a similar decision, Ontario amended its Mining Act in November 2012 so that affected First Nations could be consulted before industry could begin exploration work.

Although this decision will likely prompt the re-examination of free-entry mineral tenure regimes across the country, its effects might not be limited to the mining industry. Other statutory regimes that allow industry to acquire interests in Crown lands by complying with statutory and regulatory requirements may not meet the constitutional duty to consult if they do not allow for consultation with First Nations before industry’s acquisition of those interests.

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“For consultation to be meaningful, it must take place before claimed aboriginal rights are affected.”
REMINDER - NEW BRITISH COLUMBIA LIMITATION ACT COMING INTO FORCE

On June 1, 2013 the significantly revamped Limitation Act will come into effect in British Columbia. The Act imposes a tight two-year limitation period on most claims. Any company or person with business ties to British Columbia should closely monitor areas where litigation may be necessary, and review contractual provisions concerning potential litigation, to make sure that any potential claims are not statute-barred by the new Act.

We summarize below the main changes under the new Act. This is not an exhaustive review.

BASIC TWO-YEAR LIMITATION PERIOD

Under the new Limitation Act, in most circumstances, a claimant must sue within two years of the discovery of their claim. For most claims, this is a significant shortening of the limitation period under the present Act.

A claim is “discovered” under the new Limitation Act when the claimant knows that injury, loss or damage has occurred as a result of the defendant’s actions, and that a court proceeding would be an appropriate way to address that harm. A claimant must exercise reasonable diligence in investigating, discovering, and acting on a potential claim.

Note that the new Limitation Act provides for special discovery rules for specific types of claims, including claims involving fraud. There are special rules relating to discovery of claims by successors, predecessors, principals and agents. The new Act also provides that if another statute provides a limitation that should govern, that other statute applies.

These rules should be reviewed carefully, as they alter the formula for determining limitation periods.

ULTIMATE LIMITATION PERIOD REDUCED TO 15 YEARS

Even if the two-year limitation period can be extended through late discovery, a claim must still be brought within the “ultimate limitation period”. The new Act sets this period at 15 years (cutting in half the current period of 30 years).

The ultimate limitation period “clock” starts ticking when the original act or omission takes place, regardless of whether damage has yet occurred or whether the claim has been discovered.

Once 15 years from the original act or omission has passed, all remedies, even private remedies (including arbitration rights and references to accountants and auditors), are extinguished, barring any claim.

This extinguishment, however, is modified in three important ways. First, if the defendant confirms that the claimant has a claim against the defendant, the limitation clock will be reset for both the basic limitation period and the ultimate limitation period.

Second, the basic limitation period and the ultimate limitation period do not run, subject to a
few exceptions, while the person with the claim is under a disability or is under 19 years of age.

Finally, the new Limitation Act sets out specific types of claims (including fraud) where the ultimate limitation period “clock” does not start until the discovery of the claim, which is subject to special rules set out in the Act.

DOES THE CURRENT ACT OR THE NEW ACT APPLY?

The new Act does not provide for grandfathering or retroactivity. If the act or omission occurred and was discovered before June 1, 2013, the limitation period under the current Act will apply. If the act or omission was not discovered until after June 1, the limitation period under the new Act will apply.

This change may make a significant difference for litigants, as a claim discovered but not made before June 1, 2013 may have a limitation period of 6 or 10 years, while the same claim discovered after June 1 will only have a limitation period of 2 years.

SHORTENED LIMITATION PERIODS FOR CLAIMS FOR CONTRIBUTION AND INDEMNITY

The new Act will also significantly reduce a defendant’s right to bring claims for contribution and indemnity against third parties. Under the current Act, a defendant may wait and see whether he loses at trial before claiming against another party for contribution and indemnity. Under the new Act, the defendant will have to name a third-party or sue for contribution and indemnity soon after the start of the lawsuit against him.

ALL DISPUTES NOW IN REAL TIME

Claimants can no longer take a leisurely wait-and-see approach. All potential claims in all past and ongoing projects should be reviewed. Potential problem areas in ongoing projects and transactions should be anticipated, monitored, investigated, and swiftly acted upon. If in doubt, sue.

REVIEW CONTRACTUAL REMEDIES

When a limitation period expires, the claimant is not only barred from filing a claim in court.

All judicial and non-judicial remedies are extinguished. In other words, not only is the claimant prevented from suing, but also from things like demanding payment, carrying out rent distress, repossessing vehicles and other secured goods, and starting an arbitration. It is thus crucial to review all contracts with dispute-resolution provisions in light of the new Act.

IS IT POSSIBLE TO CONTRACT OUT OF THE NEW ACT?

The new Limitation Act does not expressly allow parties to contract out of the Act. The validity of provisions that attempt to shorten or lengthen limitation periods remains uncertain.

These are not the only provisions that will likely be of importance to you. You should review the entire new Limitation Act.

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