

Not So Fast: Federal Court of Appeal Strongly Confirms Transactional Common Interest Privilege

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April 4, 2018

The Federal Court of Appeal has unanimously overturned the Federal Court decision in *Iggillis Holdings Inc., et al. v. Minister of National Revenue*, holding that solicitor-client privilege is not waived when parties with sufficient common interest in the same transaction share opinions prepared by legal counsel on a confidential basis.

Key Takeaways

- **Counterparties to a transaction can still rely on common interest privilege to protect documents initially prepared by counsel to one party that are then shared with the other party on a confidential basis.** The Federal Court of Appeal has restored the application of deal privilege, recognizing that it facilitates an efficient process through which counterparties are able to structure and negotiate commercial transactions.
- **Common interest privilege is available in circumstances where no litigation is in existence or even contemplated.** Common interest privilege can exist as between counterparties to a transaction when both parties have a common interest in completing the deal.
- **Common interest privilege “is strongly implanted in Canadian law.”** The Federal Court of Appeal held that the lower court’s reliance on the law and policy rationale applied by the New York Court of Appeals in *Ambac Assurance Corp v Countrywide Home Loans Inc.*,¹ was inappropriate to ground a decision on whether the document was privileged under Alberta and British Columbia law.

Background

Solicitor-client privilege applies to documents created by a party’s counsel (among other things). Prior to the Federal Court’s 2016 decision, parties had operated on the understanding that an already privileged document did not lose privilege protection by being shared, confidentially, with another party that held the same or similar interests.

In 2016, however, the Federal Court eviscerated the application of common interest privilege in the context of commercial transactions. The Federal Court found that common interest privilege only applied to communications in the context of pending or anticipated litigation and that parties to a transaction could not rely on the doctrine to protect documents prepared by counsel and confidentially shared amongst transactional counterparties.

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The underlying facts involved what the Canada Revenue Agency (CRA) alleged was an abusive tax avoidance scheme. As a result, the CRA had sought production of a legal memo prepared by the purchaser's external counsel regarding the tax implications of a series of commercial transactions, which had been shared with the vendor's counsel to advance negotiations.

The Federal Court held that although the memo was protected by solicitor-client privilege, the sharing of the memo with the vendor's counsel was a waiver of privilege not otherwise protected by the common interest doctrine.

Relying on analysis by the New York Court of Appeals in *Ambac Assurance Corp v Countrywide Home Loans Inc.*,² the Federal Court concluded that deal privilege was antithetical to the doctrine and rationale underlying solicitor client privilege and would place potentially relevant information off-limits to other litigants, regulators, governmental authorities and the courts. The Federal Court expressed concern for the potential for abuse through "over-claiming" deal privilege in larger merger and acquisition transactions, the risk of enabling unlawful transactions and the impairment of the "truth-seeking legal process" of the courts.

The Appeal

The Federal Court of Appeal allowed the appeal, holding that it was not appropriate for the Federal Court judge to rely on the decision of the New York Court of Appeals to effectively overturn relevant decisions of the Alberta and British Columbia courts. By doing so, the Federal Court judge improperly applied what the law *should* be, in his opinion, based on certain policy concerns as identified by him.

In particular, the Federal Court judge was concerned about the court's access to evidence contained in the memo. The Federal Court of Appeal, however, determined that because the memo was a legal opinion about the tax implications of a series of commercial transactions, it would not be admissible as evidence in any event.

The Federal Court of Appeal re-affirmed the longstanding principle that solicitor-client privilege is not waived by disclosing information, on a confidential basis, to other parties with a common interest in the same transaction. This principle applies regardless of whether the opinion is disclosed separately or simultaneously to the parties or is the result of collaboration amongst counsel to both parties to a commercial transaction.

Conclusion

This decision reaffirms transactional common interest privilege, preserving the economic and social benefits of fostering commercial transactions and deal-making. The Federal Court of Appeal emphasized that sharing of opinions when dealing with complex statutes such as the *Income Tax Act*, may lead to efficiencies in completing transactions, resulting in better client service, and to the benefit of all of the parties

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to a series of transactions.

The Federal Court of Appeal's decision in *Iggillis Holdings Inc., et al. v. Minister of National Revenue* is available [here](#).

If you have any questions concerning this case or securities litigation generally, please contact Wendy Berman, Christopher Selby, Stephanie Voudouris or any other member of the Cassels Securities Litigation Group.

¹ 2016 FC 1352.

² 27 N.Y. 3d 616 (2016).

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