"Deal Privilege" Affirmed as FCA Tax Ruling Rejects Trial Court's Reliance on U.S. Authorities

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The Federal Court of Appeal has affirmed that “deal privilege” will continue to protect the sharing of legal advice among parties to a commercial transaction – even where the parties are on opposite sides of the deal. In *Iggillis Holdings Inc. v. Canada (National Revenue), 2018 FCA 51*, the Court unanimously held that a tax opinion drafted jointly by lawyers for purchaser and seller and provided in confidence to both clients in furtherance of a commercial deal was protected by solicitor-client privilege.

“Deal Privilege” as a Subset of Common Interest Privilege

Common interest privilege, which the Federal Court of Appeal recognized “is well entrenched in Canadian law”, is an exception to the rule that deliberately sharing privileged information with third parties waives privilege. The common interest exception was developed in the context of litigation, and dealt with the sharing of information between parties aligned in interest. Deal privilege is more of a colloquialism than a legal doctrine, but it has come to refer to a fact-pattern that may be used to establish a common interest. Practically, deal privilege refers to common interest privilege protecting the sharing of privileged information as between parties to a commercial transaction in furtherance of that transaction.

Recently, some U.S. appellate courts and academics have criticized deal privilege as being inconsistent with the rationales underlying what in U.S. law is referred to as “attorney-client” privilege, in particular because it shields relevant evidence from regulators and the courts. It is the validity in a Canadian context of these arguments from U.S. case law and academic commentary that was at the heart of the dispute in *Iggillis*.

Trial Court: Deal Privilege Denied

The central issue in *Iggillis* was whether the counterparties to a deal were required to comply with a request from the Minister of National Revenue (“**MNR**”) to turn over their jointly-prepared legal opinion regarding the application of the *Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)* (“**ITA**”) to their deal (the “**Memo**”).

In the Federal Court, the MNR argued that the Memo was not privileged because the parties were adverse in interest (being on opposite sides of the deal). The Federal Court judge rejected the MNR’s argument, and even noted that common interest privilege “is strongly implanted in Canadian law and indeed around the common-law world.” However, despite this holding, the judge ruled that common interest privilege does not extend to “deal privilege”, for two reasons:

- Following the New York Court of Appeals (“**NYCA**”) in *Ambac Assurance Corp. v. Countrywide Home Loans Inc.*, 36 N.Y.S.3d 838 (Ct. App., 2016) [***Ambac***], the Federal Court

judge ruled that deal privilege precludes the Court from receiving all of the relevant evidence in a dispute. The result is that the courts are prevented from discharging their truth-seeking role.

- Referring extensively to an article by Grace Giesel, an American scholar, in a U.S. law review, the judge held that deal privilege is essentially incompatible with solicitor-client privilege, as it is more about obtaining a tactical advantage in potential deal litigation than about preserving trust in the solicitor-client relationship.

In the result, the Federal Court judge ruled that sharing legal advice between the counterparties waived privilege in the Memo. The judge declined to follow the leading Federal Court case on common interest privilege, the *Pitney Bowes of Canada Ltd. v. Canada, 2003 FCT 214* case, on the basis that it did not deal with deal privilege. Practically, the Federal Court decision in the *Iggillis* case caused a real concern that deal privilege may no longer be recognized in the Federal Court.

Federal Court of Appeal: Deal Privilege Reaffirmed

The Federal Court of Appeal ("**FCA**") unanimously overturned the *Iggillis* decision, focusing on a technical interpretation of the relevant *ITA* provisions rather than a wide-reaching or philosophical interpretation of deal privilege at common law.

The FCA framed the issue in the case as turning on a single question, whether "deal privilege" is a valid principle of law. The FCA focused on two key elements of the Federal Court judgment: (i) a "concern about the ability of the Court to have all of the relevant evidence if the [Memo] is not disclosed"; and (ii) the Court's reliance on the rejection of deal privilege by the NYCA in *Ambac* and by Professor Giesel in her article.

The loss of relevant evidence

In response to the criticism that deal privilege can undermine the truth-seeking role of the courts by withholding relevant evidence, the FCA stressed that legal opinions on domestic law are not admissible (at para. 27):

Whether a particular section of a taxing statute will apply or how it will apply is not a matter that is to be determined based on opinion evidence presented during a hearing. Therefore, in my view, there is no loss of evidence if the [Memo] is not disclosed. There is only a loss of an inadmissible opinion on the legal implications of the transactions. The parties would each have the opportunity to argue at a particular hearing how the various provisions of the applicable taxing statutes will apply.

Central to this ruling is a finding that the Memo was comprised almost exclusively of opinions on the domestic effects of the deal, with no opinion on foreign law.

The significance of U.S. authority on issues of privilege

On the second point, the FCA held that the Federal Court judge misinterpreted s. 231.7(b) of the ITA, which governed MNR's right to request documents. The FCA stressed that "solicitor-client privilege" for the purpose of s. 231.7(b) is defined with reference to the law of the province in which the matter arose (at para. 30):

In this case, the only provinces that were identified as being potential provinces for the purposes of this definition of solicitor-client privilege were Alberta and British Columbia. Therefore, the question is whether a superior court in Alberta or British Columbia would find that the [Memo] is protected from disclosure by

solicitor-client privilege. The question is not whether the [NYCA] or the court of any other state in the United States would find that the [Memo] was protected from disclosure by solicitor-client privilege.

The FCA canvassed the law of Alberta and British Columbia in detail, concluding that deal privilege was a recognized branch of common interest privilege in each province. The FCA concluded its analysis with an endorsement of deal privilege:

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.

Notably, the FCA did not consider the application (or interpretation) of the *Pitney Bowes* case nor did it look to reconcile the Alberta or the British Columbia Courts' opinions with that decision. The upshot is that *Pitney Bowes* remains the leading authority on common interest privilege in the Federal Court, with the *Iggillis* case dealing specifically with privilege and the interpretation of s. 231.7(b) of the ITA.

Finally, the FCA concluded by saying that "when dealing with complex statutes such as the [ITA], 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 [ITA] will be of interest to all of the parties to the series of transactions."

Take-away

The *Iggillis* decision, at its core, recognizes that it makes good business sense for counterparties' lawyers to collaborate on transactional opinions (even where no litigation exists or is being contemplated) and that common interest privilege can legitimately be extended – under the rubric of "deal privilege" – to such situations. The result is that parties can continue with well-established modes of transaction planning and due diligence, including authoring joint opinions where doing so would lead to efficiencies in transactional matters.