MARCH 13, 2018

Commercial Certainty Restored: The Federal Court of Appeal Reaffirms the Existence of Transactional Common Interest Privilege

Authors: Anthony M.C. Alexander, Patricia L. Olasker and Maureen Littlejohn

Every day, across Canada, business and tax lawyers rely on the judge-made doctrine of "transactional common interest privilege" to facilitate the due diligence process and to ensure the efficient structuring and negotiation of commercial transactions.

This beneficial common law doctrine allows a party on one side of a proposed transaction to confidentially share an already-privileged document (prepared by that party's counsel) with the parties and counsel on the other side of the transaction, and to do so without sacrificing the crucial legal privilege that otherwise attaches to the transmitted material. Provided that the two sides to the proposed transaction share a "common interest" in the deal coming to fruition, Canadian courts over the past two decades have repeatedly affirmed that privileged documents passing between such parties *remain* privileged against the rest of the world.

In the face of this long-standing authority, a decision of the Federal Court stunned the legal community in December 2016 by declaring that transactional common interest privilege does *not* form part of Canadian law and *cannot* be used to protect from disclosure otherwise-privileged documents if those documents have been shared with a transactional counterparty.

Fifteen months later, on March 6, 2018, the Federal Court of Appeal reversed that decision and dispelled the cloud of uncertainty that had begun to surround this vital doctrine. In *IGGillis Holdings Inc. v. Minister of National Revenue*, 2018 FCA 51 (*IGGillis*), the Court of Appeal definitively confirmed the legal efficacy of transactional common interest privilege as a key tool for preserving the protections enjoyed by otherwise-privileged materials that have been confidentially shared between the parties to a pending transaction. In so finding, the Court affirmed that the doctrine promotes efficiency and client service in legally complex transactions.

The Court of Appeal's Treatment of Transactional Common Interest Privilege in *IGGillis*

At issue in *IGGillis* was a demand made by the Canada Revenue Agency under the *Income Tax Act* seeking to compel a taxpayer to disclose to the CRA a legal memorandum addressing the tax implications of a proposed sale transaction. The memorandum had been drafted by external counsel for the purchaser, with input from counsel for the vendor. Once the memorandum was completed, it was circulated to both the vendor and the purchaser.

The question was whether the memorandum (which embodied legal advice and was thus presumptively protected by solicitor-client privilege) remained privileged even after being shared between the parties. The CRA argued that the Court should disregard the doctrine of transactional common interest privilege and thereby find that the sharing of the memorandum had caused it to lose the benefits of solicitor-client privilege. Although the Federal Court explicitly acknowledged that transactional common interest privilege "is strongly implanted in Canadian law and indeed around the common-law world," it nevertheless sided with the CRA. The presiding judge concluded that, as a matter of public policy, the rulings that had endorsed the doctrine were wrong and should not be followed. He accordingly ordered that the memorandum be disclosed to the CRA.

The Court of Appeal rejected both this conclusion and the analysis on which the conclusion was based.

The Court of Appeal ruled that the court below had placed improper reliance on a small body of case law from the United States (which refused to accept transactional common interest privilege), while ignoring or downplaying clear Canadian jurisprudence that has repeatedly affirmed the validity and efficacy of the doctrine. The Court noted that, under the *Income Tax Act*, issues of privilege are governed by the provincial law otherwise applicable to the parties, to counsel and to the transaction in question. The laws of a foreign country are irrelevant to that analysis. Accordingly, the trial judge had erred by failing to accept clear and authoritative rulings from the applicable provinces (British Columbia and Alberta) that have consistently endorsed transactional common interest privilege.

Furthermore, the Court of Appeal found that the trial judge fell into error by asking himself the wrong question. He improperly undertook a subjective assessment of whether (in his view) the existing law constituted good "policy," when he should have limited his analysis to determining whether the existing and applicable provincial law recognized transactional common interest privilege and extended its protections to the memorandum in question. Since the laws of both British Columbia and Alberta clearly accepted this doctrine, the Federal Court had erred by refusing to apply this consistent body of authority.

Lastly, the Court of Appeal found that the lower court was wrong to base its rejection of transactional common interest privilege on a concern that the doctrine somehow prevented courts from reviewing all evidence relevant to a dispute. As the Court of Appeal noted, this consideration was illusory and irrelevant: because a document subject to solicitor-client privilege embodies the legal advice provided by a lawyer to her client, it does not constitute "evidence" per se. It is for the judge in any particular case to determine how the law applies to a fact situation, and a lawyer's opinion on that matter is irrelevant from an evidentiary perspective.

In light of these findings, the Court of Appeal concluded that – since the laws of British Columbia and Alberta clearly accept the existence of transactional common interest privilege – the sharing of the privileged memorandum between the parties to the sale transaction did not cause that document to lose the benefits of pre-existing solicitor-client privilege. Accordingly, the Court of Appeal reversed the ruling below and rejected the CRA's demand that the memorandum be disclosed.

Other Significant Aspects of the *IGGillis* Ruling

The Court of Appeal's ruling usefully highlights a number of issues that should be borne in mind by lawyers (and their clients) intending to rely on transactional common interest privilege in the future.

First, the Court helpfully confirmed that the doctrine of common interest privilege applies regardless of whether the privileged document is the work product of one party's counsel or is jointly produced by counsel for both parties. As the Court made clear,

- the doctrine applies to situations in which counsel for Client A prepares a privileged document and shares it both with her own client and with that client's transactional counterparty, Client B; and
- the doctrine is equally applicable in a scenario in which counsel for Client A works together with counsel for Client B to prepare a privileged document, and each counsel then shares the document with his or her own client.

Second, and equally helpfully, the Court further confirmed that transactional common interest privilege applies regardless of whether the document is transmitted to the two transactional parties sequentially or simultaneously. As expressly affirmed by the Court of Appeal,

- the doctrine applies to circumstances in which counsel for Client A has prepared and delivered a privileged document to her own client, and then later (perhaps much later) shares that document with Client B in the context of a subsequent transaction; and
- the doctrine also applies in cases in which counsel for Client A prepares a privileged document and then simultaneously shares it with both her own client and that client's transactional counterparty, Client B.

Third, the Court provided an important reminder to all counsel that in order for transactional common interest privilege to apply, the otherwise-privileged document belonging to one party must be shared "in strict confidence" with the transactional counterparty. Therefore, the materials may be shared between the parties and their respective counsel, but should not, as a general rule, be further disseminated to third parties.

Lastly, it should be emphasized that neither of the rulings in *IGGillis* casts any doubt on the parallel doctrine of "*litigation* common interest privilege." On the contrary, the trial judge in that case expressly accepted that when privileged documents are confidentially shared among parties with a "common interest" in the outcome of litigation, the underlying privilege attaching to those documents is not compromised. While this was not a matter directly before it, the ruling of the Court of Appeal likewise (albeit implicitly) endorsed this well-settled principle.

Conclusion

The Court of Appeal's ruling in *IGGillis* represents a welcome restoration of commercial certainty and a reaffirmation of the common law's ability to respond pragmatically to social and economic developments. Although transactional common interest privilege is a still-young, judge-made doctrine, it is now well entrenched as an important component of day-to-day commercial practice. By reversing the ruling below, and affirming the valid role that transactional common interest privilege has come to play in Canadian law, the Court of Appeal has laudably recognized this reality.

Going forward, corporate, commercial and tax practitioners (and their clients) can rely with confidence on transactional common interest privilege while confidentially sharing otherwise-privileged documents with transactional counterparties during the due diligence and negotiation processes.

While it is possible that the Crown will seek leave to appeal from the Supreme Court, it is difficult to imagine such leave being granted. The Federal Court of Appeal's ruling does not represent a change in the law, but merely provides a confirmation that the governing legal principles remain consistent, stable and eminently sensible.

Key Contacts: Patricia L. Olasker, Anthony M.C. Alexander and Maureen Littlejohn

This information and comments herein are for the general information of the reader and are not intended as advice or opinions to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations the reader should seek professional advice.

© 2024 DAVIES WARD PHILLIPS & VINEBERG LLP