

Goodmans^{LLP} Update

Federal Court of Appeal Affirms Common Interest Privilege in Commercial Transactions

The Federal Court of Appeal, in *Iggillis Holdings Inc. et al. v. Minister of National Revenue*, has overturned a lower court decision that had called into question the application of “common interest privilege” in the transactional context. In doing so, the court restored the ability of parties negotiating commercial transactions (including M&A transactions) to share privileged information with each other when evaluating and negotiating transactions, without waiving privilege.

Common Interest Privilege in the Transactional Context

As a general rule under Canadian law, if a privileged document or communication is deliberately disclosed to a third party, the privilege that attached to that document or communication is waived, not only as against the party to whom the document is disclosed, but as against other third parties in other contexts (including subsequent litigation). One of the rationales underlying the doctrine of waiver is that disclosure undermines an intention that the communication be kept confidential (an essential requirement for privilege).

As an exception to this rule, in certain circumstances, Canadian law allows parties with a “common interest” in the subject matter of a privileged document or communication to share it with each other in furtherance of that common interest, without waiving privilege. This principle was originally developed in the litigation context (e.g., co-defendants sharing defence strategies) and is often referred to as “common interest privilege”.

Before the lower court’s decision in *Iggillis*, a number of Canadian courts had extended the application of common interest privilege to the transactional context. This permitted counterparties with a common interest in completing a commercial transaction (including an M&A transaction) to share privileged information with each other during the evaluation and negotiation of the transaction without waiving privilege.

There are many reasons why parties to a commercial transaction may wish to share privileged information with each other. For example, sharing legal analysis about the potential tax consequences of the proposed transaction (which was the case in *Iggillis*), or the risks and possible outcomes of litigation, can inform pricing and risk allocation. The application of common interest privilege in the transactional context not only recognizes the practical advantages of parties sharing privileged information, but also recognizes that confidential sharing of information for the purpose of negotiating a transaction does not imply disinterest in maintaining confidentiality.

The Lower Court Decision in *Iggillis*

In *Iggillis*, the Canada Revenue Agency (CRA) brought an application before the Federal Court of Canada seeking disclosure of a memorandum that contained legal opinions about the potential tax consequences of a complex corporate transaction. The memo was primarily prepared by one party’s lawyers, with input from the other party’s lawyers, and was then circulated to both parties. The CRA argued that disclosure of the memo to each of the parties waived any privilege that originally attached to the memo.

While the lower court acknowledged that several courts in Canada had applied the doctrine of common interest privilege in the transactional context, it nevertheless concluded that, as a matter of policy, common interest privilege should not apply in the transactional context. As a result, the lower court found that the privilege that originally attached to the memo had been waived when the parties shared it with each other and the CRA was entitled to production of the memo.

The lower court’s decision caused considerable concern in the business community, as it cast doubt on well-established practices and protocols with respect to the sharing of privileged documents when evaluating and negotiating transactions.

The Appeal

On appeal, the Federal Court of Appeal overturned the lower court's decision and reaffirmed the application of common interest privilege in the transactional context. The court concluded that both the existing Canadian case law and underlying policy considerations supported the application of common interest privilege in circumstances – such as those before the court in *Iggillis* – where counterparties share privileged information in furtherance of their common interest in completing a commercial transaction. Accordingly, the court found that privilege had not been waived over the memo and, therefore, CRA was not entitled to disclosure of the memo.

It is not yet known whether the Minister of National Revenue will appeal the decision to the Supreme Court of Canada.

Conclusion

The Federal Court of Appeal's decision restores some measure of certainty to the application of common interest privilege in the transactional context and the historical practice of contractual counterparties sharing privileged information (under an appropriate confidentiality agreement) in furtherance of their common interest in completing transactions. This is a welcomed development that will help to facilitate efficient negotiation and result in better pricing and allocation of legal risks associated with such transactions.

Notwithstanding the Federal Court of Appeal's decision in this case, parties seeking to minimize the risk of inadvertently waiving privilege should limit the scope of information they disclose (and the parties to whom it is disclosed) to that which is necessary to achieve the party's objective in negotiating the transaction. If a decision is made to share privileged information, appropriate steps should be taken to document the necessity of sharing that information in order to achieve the parties' common interest in completing the relevant transaction and to ensure both parties are bound to maintain the confidentiality of such information.

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