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It was a privilege

By Neill May

I get told what not to do plenty. There are very good reasons for this. My children are young adults sensitive to my intentional ignorance of contemporary cool. My spouse is burdened by what is charitably labelled colour blindness but which we all understand is a fashion sense that straddles the border between criminal offence and undiagnosed behavioural disorder. And I benefit from many good Samaritan pedestrians' warnings triggered by my inability to walk without reading a book, my phone, a candy wrapper or whatever else I happen to be carrying.

It happens at work, too. The task of a corporate commercial lawyer is often to marshal experts in increasingly complex specialized areas to address transactional issues. Those interactions often (predictably and properly) come with warnings for the mere generalist corporate lawyers not to stray into the specialized turf. But I will risk it just this once (don't tell anyone) because occasionally an issue arises in a technical area that has the potential to affect commercial practice broadly and significantly. Such is the case with the recent Federal Court of Canada decision in *Iggillis Holdings Inc. v. Canada (National Revenue), which overturned the concept of advisory common interest privilege.*

Advisory common interest privilege has been an important tool in commercial transactions. It is common practice for confidentiality or similar agreements between the parties to clearly express the parties' intention to maintain protection for privileged information through "common interest privilege." This is unsurprising because, though the parties will almost invariably not want to compromise privilege, in analyzing and planning M&A deals, the benefits of sharing privileged information are numerous. For example, the purchaser of a business that is undergoing or likely to undergo litigation will probably be very interested to know what the lawyers to the target business have advised the target about that litigation. Another good example is what actually happened in *Iggillis*, where one party's external legal counsel completed a tax memo about the transaction that was shared with the other party's counsel, so that the parties would be on common footing where the tax issues were concerned.

In *Iggillis,* the CRA challenged the assertion of privilege, seeking to get a copy of the tax memo, and it prevailed. The decision runs contrary to much precedent; the court itself noted that advisory common interest privilege "in transactional circumstances is strongly implanted in Canadian law and indeed around the common-law world." The court described advisory common interest privilege as a discrete form of privilege, providing protection to shared communications between parties and their counsel where the common legal interest relates to a proposed transaction. This approach is notably distinct from the common conception that common interest privilege is not itself a *source* of privilege; rather, it is an exception to the general rule that privilege is lost when disclosure is made to third parties. Put differently, the information that is shared is privileged for other reasons (e.g. solicitor-client or litigation privilege) and the fact that the parties have a common interest in a commercial transaction permits the information to be shared without the established privilege being lost.

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The court's reasons speak to a concern that the availability of advisory common interest privilege would cause all commercial parties to improperly shield their negotiations and information sharing from the view of regulators and opposing litigants. This highlights the court's conception of advisory common interest privilege as a discrete form of privilege, rather than simply an exception that permits privilege that is already independently established not to be compromised.

The decision may have significant effects on how commercial transactions are negotiated and managed. It may make diligence and co-operative transaction planning more difficult. The decision itself addresses this concern, noting that "as far as the Court is able to determine, the conclusion that CIP promotes the formation of commercial contracts in the jurisprudence cited in support of this proposition, represents the unsupported opinions of judges." The *Iggillis* court considered this but appeared unmoved, noting that "those commercial transactions appearing to constitute much of the jurisprudence relating to advisory CIP (common interest privilege) are of no or questionable economic or social benefit to society" and commented further that CIP helps enable transactions of "questionable legality."

Not only are corporate lawyers often reminded of their limits in straying into technical areas, but now the Federal Court is questioning the social utility and legality of the transactions on which we work. Fortunately, this is precisely the type of challenge where good corporate lawyers can bring value: thinking of creative solutions to deal with technical impediments that complicate the consummation of commercial transactions.

I would end by saying that if you read this column while crossing traffic, don't. But that would just be like the confusing cautions that appear at the bottom of every modern email, where the very last paragraph of the email you've read tells you that if the email wasn't intended for you it's confidential so don't read it. **CL**

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