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Shifting sands of the law of privilege

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In the past year, the Supreme Court of Canada reaffirmed the sanctity of solicitor-client and litigation privilege, setting a high standard for legislatures that intend to abrogate from the broad protection that privilege offers. At the same time, two other decisions (one of the Federal Court, and one of the English High Court) could dramatically erode the protection in areas where it was thought to have been long-established – specifically, "deal" or "transaction" privilege and the privilege attaching to documents prepared by counsel during an internal investigation. If these two decisions are upheld on appeal, their potential ramifications could be far-reaching.

Federal Court deals significant blow to deal privilege

The Federal Court placed "deal" or "transaction" privilege under significant scrutiny in its decision in *Minister of National Revenue v Iggillis Holdings Inc (Iggillis)*. This decision is currently under appeal to the Federal Court of Appeal. Unless reversed or substantially narrowed on appeal, *Iggillis* may mean that privilege will no longer protect from production legal advice shared between parties in furtherance of a commercial transaction.

"Deal privilege" is the colloquial name for a category of common interest privilege. Normally, solicitor-client privilege over a document is waived when that document is shared with a third party. However, the courts have historically recognized that privilege may still be maintained where the document is shared with a third party that has a common interest in defending actual or anticipated litigation. In reliance on those principles, a number of Canadian courts have gone further, and have held that privilege may be maintained where a party shares a privileged document with a third party that has a common interest in completing a transaction.

The Court's ruling in *Iggillis* has now cast serious doubt on whether deal privilege still exists. In short, in the context of a privilege challenge by the Canada Revenue Agency in a tax case, the Federal Court held that privilege did not attach to a legal opinion that had been shared between opposite parties to a commercial transaction that discussed various tax issues arising from the transaction. The Court agreed that the memo reflected legal advice prepared by a lawyer for his client and was therefore protected by solicitor-client privilege in the hands of the client. However, the Court held that privilege was lost when the memo was shared with the opposing party. As a result, the Court held that the opinion had to be produced to the CRA in response to a statutory production requirement.

In its reasons, the Court expressed a concern that deal privilege had been used to allow parties to improperly shroud commercial dealings and negotiations. Deal privilege, the Court held, had significantly expanded the quantity of relevant evidence that is denied to the courts, was not available to most users of legal services, and provided no benefit to the administration of justice.

While the Court's ruling is not strictly binding on provincial Superior Courts, the Federal Court's ruling has cast serious doubt on the existence of advisory common interest privilege in Canada. However, it is important to stress that the Court did not challenge a party's ability to assert common interest privilege in respect of actual or pending litigation. Moreover, the Court continued to recognize the ability of parties to retain common counsel, and to assert privilege over communications with common counsel.

As a result of *Iggillis*, if parties to a commercial transaction wish to share legal advice relating to the transaction, they may have to exercise additional caution. In particular, until the Federal Court of Appeal releases its decision (currently under reserve), "allied lawyers" of a purchaser and vendor who wish to share legal advice on tax and legal issues may have to consider the additional formality and cost of engaging common counsel to maintain a claim of privilege over sensitive legal advice. In the absence of such measures, parties to a commercial transaction may not be able to maintain privilege over such advice and may have to produce such advice to the CRA, regulators or even third parties in response to a production demand. As such, parties to a deal will have to balance the very real risk of potentially having to produce the advice against the efficiencies that may be gained from sharing it during the transaction.

UK Court finds internal investigation notes not privileged

Looking abroad, this past May, the English High Court released its decision in *Director of the Serious Fraud Office v Eurasian National Resources Corporation Ltd. (Eurasian National Resources)*, which held that documents prepared by legal counsel during a company's internal investigation were not protected by litigation privilege. The company had carried out an internal investigation relating to allegations of corruption and bribery. In the course of the investigation, the company's external counsel prepared working papers and notes of interviews with dozens of individuals. The company claimed these documents were litigation privileged because they had been prepared under the reasonable contemplation that an investigation by the UK's Serious Fraud Office (SFO) was imminent. They further claimed the notes were protected by legal advice privilege (the British equivalent of solicitor-client privilege).

The English High Court found that a potential investigation by the SFO was insufficient to ground a claim of litigation privilege, since an investigation was merely a preliminary step before prosecution and did not constitute "adversarial litigation." It further found that documents generated under no more than a "general apprehension" of future litigation cannot be protected by litigation privilege simply because an investigation is (or is believed to be) imminent. The Court also rejected the application of legal advice privilege to the interview notes because they were not generated in the course of the company conveying instructions to its counsel. In October, the company was granted permission to appeal the decision to the Court of Appeal.

As it is not a Canadian decision, it remains to be seen what impact *Eurasian National Resources* may have on judicial thinking in Canada. On one hand, Canadian courts have, in the past, viewed UK decisions as persuasive or informative. On the other hand, Canadian courts have previously been prepared to recognize a party's ability to assert solicitor-client privilege and litigation privilege in connection with an internal investigation. At the very least, this UK decision demonstrates that the courts in other common law jurisdictions are taking a close look at the limits of privilege in the context of internal investigations.

If its reasoning is adopted by Canadian courts, the decision will raise important considerations for companies, in-house counsel and external lawyers conducting internal investigations. Counsel should not automatically assume that interview notes and other documents produced during an internal investigation will be protected by privilege.

Furthermore, the decision has potential implications for companies with overseas operations and subsidiaries who are increasingly subject to cross-border government and regulatory investigations into issues like securities fraud, anti-competitive conduct, products liability, corruption, money laundering and environmental issues.

Supreme Court affirms robust protection afforded by solicitor-client and litigation privilege

In decisions released contemporaneously at the end of 2016 in *Alberta (Information and Privacy Commissioner) v University of Calgary (Alberta Privacy Commissioner)* and *Lizotte v Aviva Insurance Company of Canada (Lizotte)*, the Supreme Court of Canada came down on the side of protecting privilege in interpreting legislation requiring parties to produce documents that would otherwise be protected by privilege. In short, the Court held that while a legislature may override privilege in narrow circumstances, it must do so in a "clear, explicit and unequivocal" manner in light of the fundamental importance of legal privilege to the Canadian legal system.

In *Alberta Privacy Commissioner*, a former employee sought disclosure of records from the University of Calgary pursuant to Alberta's *Freedom of Information and Protection of Privacy Act (FOIPPA).* The university withheld certain records on the basis they were subject to solicitor-client privilege. A delegate of Alberta's Information and Privacy Commissioner nevertheless ordered the university to produce the documents pursuant to s. 56(3) of *FOIPPA*, which requires a public body to produce documents to the Commissioner upon request despite "any privilege of the law of evidence." The Supreme Court held that the university was not required to produce documents protected by solicitor-client privilege. Given the importance of the privilege, the Court confirmed that it could only be statutorily abrogated by language that was "clear, explicit and unequivocal." The Court found that s. 56(3) did not meet this threshold, as solicitor-client privilege was a category of privilege broader than a "privilege of the law of evidence." While access to information is an "important element of a modern democratic society," the Supreme Court found that solicitor-client privilege is "fundamental to the proper functioning of our legal system and access to justice."

The Court's decision in *Lizotte* held that a regulator could not compel production of a regulated insurer's entire file in the face of an assertion of litigation privilege. Section 337 of the *Act respecting the distribution of financial products and services* obliges regulated insurers to "forward any required document or information concerning the activities of a representative" to the regulator. The company refused to produce certain documents on the grounds that they were litigation privileged.

The Supreme Court upheld the litigation privilege, underscoring its fundamental importance and noting that it "serves an overriding 'public interest' [...] to ensure the efficacy of the adversarial process." Applying the same threshold as it did in *Alberta Privacy Commissioner*, the Court held that "unless clear, explicit and unequivocal language has been used to abrogate" the privilege, "it must be concluded that the privilege has not been abrogated." The open-ended language in s. 337 ("any required document") did not meet this statutory threshold and, therefore, the documents did not have to be produced.

Conclusion

The fundamental protections afforded by the long-established principles of solicitor-client and litigation privilege are bedrock principles underlying the administration of justice. Yet the scope of those protections is clearly still evolving and has yet to be fully determined. As the privilege landscape continues to shift, companies and their counsel need to remain fully

apprised of new developments to ensure that privilege over potentially sensitive records is not inadvertently waived.