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Common Interest Privilege in Corporate Transactions

Date: August 2010

Vern Krishna

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The doctrine of legal privilege allows persons to obtain legal advice from their lawyers in confidence. Privilege flows from the right of a person to obtain skilled advice about the law. A person cannot properly obtain legal advice if she does not have confidence in the sanctity of communications, untrammelled by any apprehension of disclosure, with the legal advisor. Although privilege flows from the lawyer’s duty of confidence and the client’s right of privacy, it is a substantive legal right and a rule of fundamental justice

The law presumes a solicitor-client privilege to exist in communication between a lawyer and his or her client. It does not extend to accountant—client communications. The onus is on the person who wishes to dislodge the privilege to show that it no longer applies in the particular circumstances.

A person can lose solicitor-client privilege by waiving it or disclosing the privileged document to third parties. For example, disclosure of privileged documents to an accountant may result in loss of the solicitor-client privilege.

Whether or not a person loses privilege depends upon the particular circumstances, the expectations of the parties and the nature of the disclosure. The *Income Tax Act*, for example, recognizes a lesser form of privilege for taxpayers. The statute specifically excludes a lawyer’s accounting records, including supporting vouchers and cheques, from privileged communications.

This seemingly innocent exclusion of records is in fact very broad because it includes accounts, agreements, books, charts, tables, diagrams, invoices, letters, memoranda, statements, “and any other thing containing information.” The only restriction is that the record must pertain to “accounting.”

Thus, tax lawyers are squeezed between their professional conduct rules, which require them to justify their accounts, and their obligation to protect their clients' confidentiality. They need to justify their accounts, but, by doing so, they can inadvertently disclose information in their accounting records that waives or discloses the privilege to the detriment of their clients.

Solicitor-client privilege also extends to all documents that litigants prepare and share with other persons who, while not parties to the litigation, have interests in common with each other. For example, suppose that owners of two adjoining houses complain of a nuisance that affects them both equally. Both of the owners may take legal advice and exchange relevant documents. If only one of the owners sues in a subsequent action in the nuisance claim, the law considers both persons as if they were partners in a single firm and each can claim the privilege in aid of litigation.

Besides litigation privilege, the law also recognize another kind of privilege—the common interest in the successful completion of commercial transactions. Common interest privilege in commercial transactions promotes a common understanding of legal aspects of the transaction that, once understood, will facilitate the completion of the transaction. This form of privilege rests on the economic and social values inherent in fostering commercial transactions where business people and corporations share legal advice.

For example, in the purchase and sale of a business, the vendor may develop a legal opinion and show it to the purchaser, who may choose to act upon it. Despite the sharing of the opinion between the parties, the document retains its privilege because its purpose was to promote the common interest of the parties to the transaction. As such, the parties do not automatically waive solicitor-client privilege.

Parties to multi-lateral commercial transactions sometimes obtain legal opinions that they share with other persons with common interests in facilitating the transaction. For example, a lawyer acting for a purchaser of property may, with consent, disclose the opinion to the seller so that both sides can understand the tax implications of the transaction. In a subsequent audit, the Canada Revenue Agency may demand to see all documents, including the legal opinion, relating to the particular transaction on the premise that the purchaser's disclosure waived his solicitor-client privilege.

The issue with common interest legal documents is not whether the legal opinion is privileged, but whether, by sharing the opinion with a person who has a common interest, the parties lose their privilege. The privilege remains intact if the persons who share the opinion have common interests. Obviously, the party with legal privilege loses it if he or she shares the opinion with parties with adverse interests.

The essential element in preserving privilege is that the parties intend the document to remain confidential as against outsiders. The parties may expressly state their expectations may be that the opinion is for the benefit of all parties to the transaction. The law may also imply expectations from the conduct of the parties.

There is, however, no bright line test to determine when persons waive privilege in a common interest transaction through disclosure. Each case depends upon its own facts. For example, corporations to a potential merger or acquisition may have a common interest to complete the transaction, but also have other interests that are adverse to each other. It is a question of fact whether the common interest privilege applies to disclosure in these circumstances.

Of course, the most prudent course of conduct is to clearly specify and claim the privilege at the time that the advisor prepares the document and state the expectation of the parties to the transactions that they do not intend to waive the privilege by disclosing the opinion to common interests. All the more so in internet and email communications, which may pass through multiple channels and that third parties may intercept. Take care before you hit the "Reply all" button.

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