

Beware the Taxman Seeking Your Privileged Information

By

Vern Krishna, CM, QC, FRSC, LSM

There are very few rules in tax law that protect taxpayers. Most are written to protect the Canada Revenue Agency and the government. The doctrine of legal privilege is one of the few rules that are intended to protect the legal system and preserve the rule of law.

Legal privilege is essentially judge made law, which the *Income Tax Act* attempts to legislatively mitigate. Fortunately, the Supreme Court of Canada has resisted governmental intrusions into the doctrine. However, taxpayers must know the boundaries of legal privilege and protect it.

The law protects professional communications between a client and his or her legal advisors. Legal secrecy is privileged from unauthorized disclosure to third parties. This fundamental doctrine, which is essential in tax planning and litigation, does not extend to accountants.

The starting rule for the admissibility of evidence in litigation is that it should be relevant and of probative value. However, for reasons of public policy, solicitor-client privilege can shield certain relevant and probative materials from being tendered in evidence in a courtroom. Subject to some exceptions, neither counsel (whether barrister, solicitor, law clerk, or intermediate agent of either, or an interpreter) nor the client (whether party or stranger) can be compelled to disclose oral or documentary communications passing between them in professional confidence.

Legal privilege is more than an evidentiary rule of exclusion. It is a substantive rule: "the fundamental right of a lawyer's client to have his communications kept confidential."

The Supreme Court of Canada stated the rule in *Canada (Attorney General) v. Federation of Law Societies of Canada* (Justice Cromwell) as follows:

The centrality to the administration of justice of preventing misuse of the client's confidential information, reflected in solicitor-client privilege, led the Court to conclude that the privilege required constitutional protection in the context of law office searches and seizures: "The important relationship between a client and his or her lawyer stretches beyond the parties and is *integral to the workings of the legal system itself*".

There are two competing interests in the doctrine of legal privilege:

1. openness and candour in the legal process, and
2. the right of people to seek legal advice to ensure fairness in the administration of justice.

The purpose of legal privilege is to promote uninhibited communications between professionals so that they can effectively render legal services. Hence, privilege arises where lawyers give professional legal advice to clients or represent them in disputes. The rationale is to ensure public

confidence in the legal system. Hence, privilege protects material from disclosure even though it may otherwise be probative and trustworthy.

Privileged communications do not require balancing their relevance against their immunity from disclosure. They are protected *regardless* of relevance [*Imperial Oil v. Jacques*, [2014] 3 S.C.R. 287, para. 99]. So much so that privilege even survives the death of the client and passes to his or her next of kin or successors.

The cardinal rule of solicitor-client privilege is that it belongs to the client and protects her interests. It is not intended to protect the interests of the solicitor. "Privilege does not come into being by an assertion of a privilege claim; it exists independently." The lawyer "merely acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client."

The important point to remember is that a person (the client) who enjoys privilege forfeits it if he or she shares the information with a third party who is covered by the privilege. Although the provisions of the *Income Tax Act* dealing with privilege are subject to the *Charter of Rights and Freedoms*, the Canada Revenue Agency will try to "snooker" a taxpayer's legal privilege by refusing his deduction for legal fees unless she discloses the legal advice obtained in support of the expenses. When the CRA employs this tactic, it effectively negates the taxpayer's constitutional protections.

Taxpayers beware when the CRA seeks privileged information. Consult your lawyer before disclosing the information. Once disclosed, the privilege is lost.

Counsel, Tax Chambers LLP (Toronto)

vern.krishna@taxchambers.ca

www.taxchambers.ca