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Federal Court Refuses to Recognize Common Interest Privilege in the Transactional Context

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The doctrine of "common interest privilege" ensures that a document or communication that is *already* protected by solicitor-client or litigation privilege does not *lose* that protection when it is shared between two parties sharing a "common interest" in either litigation or a transaction. In a lengthy decision released on December 12, 2016, the Federal Court refused to recognize the version of this doctrine that has become known as "transactional common interest privilege." *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2016 FC 1352 (*Iggillis*) is significant because, in the words of the Court itself, it stands as the "first Canadian decision that concludes that [common interest privilege] should be limited to litigation-related matters."

The analysis in *Iggillis* is a marked departure from the existing body of common interest privilege case law that has been consistently developed and applied by Canadian courts. In concluding that common interest privilege has no application in the transactional context, the Court in *Iggillis* characterized the doctrine in a manner that is fundamentally different from the approach reflected in the prevailing Canadian authority. More specifically, the Court appeared to view the doctrine as a *stand-alone* form of privilege rather than as a limited defence to the waiver of *other* forms of privilege. For this reason, although the *Iggillis* ruling spans nearly 130 pages, it raises more questions than it answers. Furthermore, given the substantial body of existing Canadian case law that supports a contrary conclusion, the authority of *Iggillis* may legitimately be questioned. Further guidance from the Federal Court of Appeal is needed in order to provide parties with certainty concerning this important issue.

The Basics of Common Interest Privilege

Canadian courts have repeatedly affirmed the fundamental role played by legal privilege in safeguarding individual rights and in facilitating the administration of justice. Recognizing the importance of both solicitor-client privilege and litigation privilege, courts have developed principled mechanisms designed to ensure that the benefits of privilege are preserved and are lost only when appropriate.

A significant tool that has been used for decades by Canadian courts to prevent the inappropriate loss of privilege is the doctrine of "common interest privilege." Despite its name, common interest privilege is *not* itself a species of legal privilege. Rather, it is a doctrine that allows unaffiliated parties who possess a common interest in either a legal proceeding or a commercial transaction to confidentially share with one another materials that are *already* subject to either solicitor-client or litigation privilege without that privilege being lost as a result. As used in both the litigation and transactional contexts, this doctrine (which could more accurately be labelled the "common interest waiver exception") has been accepted for decades by both trial and appellate courts in Canada.

The Findings of the Court in *Iggillis*

In *Iggillis*, the Court ordered a taxpayer to disclose to the Canada Revenue Agency (CRA) a legal memorandum that addressed the tax implications of a sale transaction. The memorandum had been drafted by external counsel for the purchaser, who then shared it with counsel for the vendor. The matter in dispute before the Court was whether the memorandum was solicitor-client privileged in the circumstances. The taxpayer/vendor and the intervener/purchaser argued that it was; the CRA argued that it was not.

The Court sided with the CRA. Justice Annis ruled that common interest privilege can be used to safeguard the privilege attaching to shared documents *only* when the common interest shared between the parties involves pending or anticipated litigation – *not* when that common interest involves a commercial transaction. In arriving at this conclusion, the Court seems to have based its analysis almost

entirely on cases and secondary authorities from the United States. The analysis does not discuss (i) the significant differences in the scope of solicitor-client privilege that exist between Canada and the United States; nor does it acknowledge (ii) many of the authoritative Canadian rulings that have accepted and applied common interest privilege in both the litigation and the transactional contexts. These important appellate rulings include *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) (a foundational authority addressing common interest privilege in the litigation context) and *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 (one of the leading decisions confirming the applicability of common interest privilege in the transactional context).

A key theme in the *Iggillis* ruling is the Court's concern that the availability of transactional common interest privilege would allow parties to improperly throw a shroud over their commercial dealings and negotiations, relying on their common interest to shield all such communications from further sight. This concern appears misguided, however, since common interest privilege is *not* itself a form of privilege. As explained above, the doctrine is an *exception* to the general principle that when an *otherwise-privileged document* is shared with a party outside the solicitor-client relationship, the privilege is permanently waived. Common interest privilege has *no* application when the relevant communication or document is *not* already protected by either solicitor-client or litigation privilege. For example, communications passing between opposing parties during the negotiation of a transaction will not ordinarily be privileged, except when such communications involve the sharing of materials that are *already* privileged (such as legal opinions or documents prepared for litigation).

Conclusion

In circumstances where Canadian courts have spent the last 30 years tightly delineating the scope of solicitor-client privilege, the Federal Court's concern that large swaths of non-privileged communication would become immune from disclosure owing to the parties' "common interest" is surprising. Despite the occasional uncertainty in the jurisprudence, Canadian judges have clearly and consistently found that – in both the litigation and the transactional contexts – the doctrine of common interest privilege is a useful, principled and *limited* exception to waiver.

Although *Iggillis* is currently an outlier in the Canadian common interest privilege landscape, its implications for parties to commercial transactions may be significant. Until the Federal Court of Appeal addresses the matter – either by reversing this ruling or by otherwise providing guidance concerning these issues – parties exchanging privileged documents and communications in the transactional context (particularly in relation to tax, commercial, patent and competition matters) must be wary of the precedent that *Iggillis* has set and the potential loss of privilege that they may face.

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