

## Transactional Common Interest Privilege Preserved

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In a unanimous decision, the Federal Court of Appeal overturned the 2016 ruling of the Federal Court in *MNR v Iggillis Holdings Inc.*, 2018 FCA 51 and, in doing so, reaffirmed the status of transactional common interest privilege in Canada.

In its ruling (2016 FC 1352), the Federal Court had concluded that sharing privileged communications during the course of due diligence or transaction planning with a counterparty to a proposed transaction would result a waiver of privilege in most cases.

The Court of Appeal has now firmly determined that solicitor-client privilege is not waived when privileged communications are shared, on a confidential basis, between parties with sufficient common interest in the same transaction. The decision therefore stands as an important confirmation of the legal status and protections accorded in Canada to common interest privilege in the transactional context.

### Transactional Common Interest Privilege

Solicitor-client privilege protects communications between a lawyer and a client that are made for the purpose of seeking or giving legal advice, and which are intended by the parties to be confidential.

Prior to the lower court's decision in this case, both the Federal Court and provincial Superior Courts had recognized that parties to a commercial transaction could share privileged legal opinions in furtherance of their common interest in executing a transaction, without waiving privilege.

The ability to rely on transactional common interest privilege was fact-specific. In particular, the parties had to demonstrate that they intended to keep the opinions confidential, that they shared a common interest in completing the proposed transaction, and that the exchange of the opinions was made in furtherance of that common interest.

### Lower Court Decision Puts Transactional Common Interest Privilege in Peril

In its decision, the Federal Court acknowledged that transactional common interest privilege had been widely recognized by courts across Canada and in common law systems around the world. Nevertheless, it held that privilege over the legal memo at issue had been waived, and that it therefore had to be disclosed to Canada Revenue Agency (CRA).

The Federal Court did not reach this conclusion based on any factual concern about whether the memo was privileged, or whether it was intended to remain confidential among the parties. Rather, it determined that the widely-accepted policy rationale for the privilege was unsound.

At the core of the Federal Court's decision was the belief that the benefits associated with protecting privileged communications disclosed in the context of a proposed commercial transaction were speculative, while the cost to the administration of justice was obvious (namely, the suppression of relevant documents that the opposing party in a dispute or litigation context – in this case, the CRA – might otherwise seek to access).

### **Court of Appeal Reaffirms Status of Transactional Common Interest Privilege**

The Court of Appeal overturned the Federal Court's decision, restoring the status of transactional common interest privilege as a legitimate doctrine at law. In doing so, the Court of Appeal considered and rejected the two principal bases underlying that decision.

First, the Court of Appeal determined there would be no loss or suppression of relevant evidence in this case since the memo at issue (which comprised almost exclusively of opinions on the legal effects of the transactions) would be inadmissible at trial in any event.

Second, and more significantly, the Court of Appeal noted that the CRA's powers under the *Income Tax Act* to require production of the memo were tempered by the determination that the memo was privileged; a question to be determined by a Superior Court of the province where the matter had arisen (in this case, Alberta or British Columbia). Since the memo would be considered privileged under the laws of either province, the CRA had no power to enforce disclosure.

With respect to the sufficiency of the common interest, the Court of Appeal noted that, where complex statutes such as the *Income Tax Act* are engaged, the application of the legislation will generally be of interest to all of the transacting parties and that the sharing of privileged communications may lead to efficiencies in completing the transaction. The Court of Appeal did not clarify the extent to which transactional common interest privilege can extend beyond commercial transactions to other types of common endeavours.

### **Implications Going Forward**

For transacting parties and practitioners intending to rely on common interest privilege, the Court of Appeal's decision provides useful guidance.

The Court confirmed that the privilege applies regardless of whether the privileged communication is the work product of one party's counsel or is jointly produced by counsel for both parties. In addition, the privilege applies regardless of whether the privileged communication is transmitted to the two parties sequentially or simultaneously.

The Court of Appeal's decision realigns federal jurisprudence concerning transactional common interest privilege with the jurisprudence in the provinces. Just as importantly, the decision recognizes and restores the legitimacy of this privilege in facilitating commercial transactions in Canada. Importantly, however, as the Court emphasized, for the privilege to apply, the privileged communication must be shared "in strict confidence" and should not, as a general rule, be further disseminated to third parties.