

Federal Court of Appeal clarifies and reaffirms transactional common interest privilege: Iggillis Holdings Inc. v. M.N.R., 2018 FCA 51



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In a unanimous decision, the Federal Court of Appeal has overturned a 2016 decision of the Federal Court of Canada and, in doing so, restored a significant measure of clarity and certainty concerning the ability of parties to share privileged communications in furtherance of a proposed commercial transaction. In its [2016 decision](#), the Federal Court held that sharing privileged communications during the course of due diligence or transaction planning would act as a waiver of privilege in most cases. This decision caused considerable concern, as it had the potential to create a significant impediment to transaction execution.

The decision of the Federal Court of Appeal in [Iggillis Holdings Inc v. M.N.R. \(Iggillis\)](#) [PDF] comprehensively overturned the lower court's decision. It realigns the Federal Court with provincial Superior Courts by confirming that common interest privilege serves a legitimate purpose, and can validly be asserted in the transactional context.

Common interest privilege and the lower court's decision

Solicitor-client privilege protects communications between a lawyer and a client that are made for the purpose of seeking or giving legal advice and that are intended by the parties to be confidential. Normally, deliberately sharing a privileged communication with a third party is a waiver of privilege. The reason for this is that disclosure of a privileged communication to a third party is incompatible with the idea that it was intended to be confidential, which is at the core of solicitor-client privilege.

Prior to the lower court's decision, both the Federal Court and provincial Superior Courts across Canada had recognized that parties to a commercial transaction could share privileged legal opinions with one another in furtherance of their common interest in executing a transaction, without waiving privilege. The ability to rely on transactional common interest privilege (sometimes referred to as "deal privilege") was fact specific. In particular, the parties had to demonstrate that they intended that the opinions were to remain confidential as regards the rest of the world, that they shared a common interest in the completion of the proposed transaction, and that the exchange of privileged communications was made in furtherance of that common interest.

The lower court decision acknowledged that transactional common interest privilege is widely recognized across Canada and in common law systems around the world. Nevertheless, the court held that sharing the privileged legal memorandum at issue (the Memo) among the parties to a proposed transaction had resulted in a waiver of privilege, and that it therefore had to be disclosed to Canada Revenue Agency (CRA).

The lower court concluded that the widely accepted policy rationale behind transactional common interest privilege – that it facilitates parties’ legitimate interests in concluding transactions efficiently – was unsound. The lower court’s decision stood for the proposition that as a matter of principle, courts ought not to give effect to transactional common interest privilege except in extremely limited circumstances. For a more detailed discussion of the lower court decision, please refer to our prior [Update](#).

Federal Court of Appeal restores and reinforces the validity of common interest privilege

In a unanimous decision, the Court of Appeal overturned the lower court’s decision, and restored common interest privilege to its place as a legitimate doctrine at law.

In this case, the Memo was prepared jointly by the transacting parties’ respective counsel and provided to both parties. However, the same principles would have applied if the Memo had been prepared by counsel for one party and then shared with the other party. As a result, the Court of Appeal issued the judgment that it determined ought to have rendered at first instance, and dismissed CRA’s application to require production of the Memo.

The Court of Appeal’s decision considered and rejected the two principal bases of the lower court’s decision. First, the lower court held that transactional common interest privilege had the undesirable effect of preventing the court from having all relevant evidence available to it. The Court of Appeal rejected this conclusion for the simple reason that, to the extent the Memo contained the parties’ opinions concerning the legal effect of the transactions, such opinions would be irrelevant and inadmissible.

Second, the Court of Appeal noted that the CRA’s purported right to require disclosure of the Memo rested on specific provisions in the *Income Tax Act*. The question before the Court of Appeal, based on the relevant provisions, was whether the Memo would be privileged in the Superior Court of the province where the “matter arises” (in this case Alberta or British Columbia). Since the Memo would be considered privileged in Alberta and British Columbia, the CRA had no right to insist that it be produced.

The Court of Appeal went on to note that the recognition of transactional common interest privilege is consistent not only with the law of Alberta and British Columbia, but with previous decisions of the Federal Court of Canada, and other provinces, and leading commentary on the law of evidence in Canada. The Court of Appeal held that it was not appropriate for the lower court to “effectively overturn” a doctrine that is widely recognized across Canada and throughout the common law world (at paragraph 40). The Court of Appeal also rejected the lower court’s suggestion that transactional common interest privilege is merely a tool to hide suspect transactions. On the contrary, the Court noted that sharing privileged communications “may well lead to efficiencies” in concluding transactions, and therefore serve the interests of all parties (at paragraph 42).

Normal service has been resumed

The Court of Appeal's decision realigns federal jurisprudence on this issue with the jurisprudence in the provinces. Just as importantly, the decision recognizes and restores the legitimacy of transactional common interest privilege as a tool available to facilitate commercial transactions in Canada. In light of the Court of Appeal's decision, commercial practitioners and transacting parties should breathe a sigh of relief.