Solicitor client privilege in tax matters

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May 22, 2015

In a prior blog post, I said that solicitor client privilege remains strong in Canada. A recent judgment of the Federal Court included two throwaway comments, so easily quotable, that appear to suggest that solicitor client privilege does not extend to "tax planning" advice.

In *Canada v. Revcon Oilfield Constructors Incorporated, 2015 FC 524*, the Federal Court offered the following two gems that the government will be sure to cite when they want to seek tax planning documents from a taxpayer:

- "*Tax planning communications are not privileged*"; and
- "*Advice given by an accountant (or, I would add, by a lawyer for accounting or tax planning purposes) does not fall within the scope of solicitor-client privilege:* Canada (National Revenue) v Grant Thornton, *2012 FC 1313 at para 22*".

Most tax lawyers divide tax files into one of two categories: litigation or planning. To someone used to thinking in those categories, the comments from the Federal Court above would seem to suggest that the latter does not attract solicitor client privilege. However, that is not a correct statement of the law. Generally, a tax lawyer's communications with his clients in furtherance of providing legal advice for tax planning attract solicitor client privilege. In fact, that is exactly what the Federal Court determined in *Revcon* – the Court held that the communications for legal planning advice were subject to solicitor client privilege. The closing documents themselves (directors' resolutions, purchase agreements, etc.) were not, but there was no reason that they should as they are not communications with a lawyer.

Why the confusion, then? It appears that the Court interpreted "tax planning communications" to mean business (or possibly accounting) advice, and not legal advice.

The Federal Court relied upon *Canada v. Grant Thornton*, 2012 FC 1313 for its conclusion that tax planning communications are not privileged. The only way that *Grant Thornton* supports that position is if one interprets "tax planning communication" to mean business advice or something other than legal advice. Paragraph 22 of Grant Thornton illustrates this point, as follows:

> … In brief, **SCP protects all communications made within the framework of the solicitor-client relationship** (*Descôteaux v Mierzwinski* [1982] 1 SCR 860, at para 71; *Canada (Privacy Commissioner) v Blood Tribe Department of Health* [2008] 2 SCR 574, at para 10 [*Blood Tribe*] ; *Samson Indian Band v Canada*, [1995] FCJ No 734, at para 8). **However, communications made outside of that framework are not protected by SCP** (*Solosky*, above, at 835). For example, **SCP does not extend to purely business or policy advice that may be provided by a solicitor** (*R v Campbell* [1999] 1 SCR 565, at para 50), or to documents that are not

> otherwise privileged and somehow come into the possession of a solicitor (*Belgravia Investments Ltd v Canada*, [2002 F.C.R. No. 870, at para 46 [*Belgravia*]).

"Tax planning advice", as I think that phrase is used by anyone who practices tax, is legal advice, not business advice. What business advice is required in tax planning? Paying tax later is better than paying tax sooner; paying less tax is better than paying more tax – that is the extent of the business advice in tax planning. Advice on how to navigate the tax rules to accomplish those objectives is unequivocally legal advice. If provided by a lawyer, any communication containing such advice attracts solicitor client privilege.

Sure, clients often have to make business decisions about a proposed transaction that involves tax considerations. In those cases, the business considerations and the tax considerations of a potential plan must be considered before the client decides how, or whether, to proceed. Tax professionals provide the legal advice on how to navigate the tax rules, not the business advice on whether it makes sense to proceed with a transaction. Clients do not pay the high rates charged by tax advisors to receive business advice; they pay it to receive legal advice. Surely the client cannot come back and sue the tax advisor because the business side of the transaction did not work out. But they can certainly sue the tax advisor if they got the law wrong!

I know some lawyers, particularly in the M&A and commercial fields, pride themselves on providing their clients with astute business advice together with legal advice when completing transactions. I suspect that some of the communications that those lawyers have with their clients might not be subject to privilege for the simple reason that they are not related to the provision of legal advice. However, when tax lawyers use the term "tax planning advice" they are invariably referring to legal advice.

On a related note, tax planning advice is often given by experienced tax accountants. It would be naïve to think that such advice is not also legal advice, and certainly the accountants in our firm agree with me. Of course, if tax planning advice is given by accountants, it will not be privileged unless care is taken to ensure that it is part of the solicitor-client communication, required to provide the legal advice with a lawyer. Why is tax planning advice coming from a lawyer privileged while the same advice coming solely from an accountant is not? After all, any distinction hardly seems fair in the result to the client receiving the advice. Well, that is a separate topic for another discussion.