

Canada Revenue Agency Forces Taxpayer to Disclose Discussions With Accountant

by Steve Suarez

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FEATURED PERSPECTIVE

Canada Revenue Agency Forces Taxpayer to Disclose Discussions With Accountant

by Steve Suarez

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The author explains a recent Tax Court of Canada decision that clarifies lawyer-client privilege in Canada: Taxpayer communications with non-lawyer accountants are not covered under the lawyer-client privilege.

The Canada Revenue Agency has extensive powers to obtain information that may be relevant to the administration and enforcement of the Income Tax Act (Canada). So long as the “may be relevant” standard (a very low threshold) is met and the CRA is not either (1) using its civil powers to conduct a criminal investigation, or (2) otherwise using its statutory powers for an improper purpose or in violation of Canada’s Charter of Rights and Freedoms, the recipient of an information demand generally has no basis for refusing to comply with the CRA’s demand, with one important exception: if the information is protected by lawyer-client privilege.¹

Similarly, once a reassessment is appealed to the Tax Court of Canada, the taxpayer and the CRA will exchange lists of documents and be subject to examinations for discovery. Lawyer-client privilege is one of the limited bases that a tax litigant can use to justify not providing the other party with requested information that is relevant to the tax dispute. A recent decision of the Tax Court of Canada usefully illustrates the importance of lawyer-client privilege in a tax context.

¹See Patrick Lindsay and Salvatore Mirandola, “Resolving Tax Disputes in Canada,” *Tax Notes Int’l*, June 11, 2012, p. 1043.

There are two main types of lawyer-client privilege in Canada that apply to protect information and documents from disclosure: solicitor-client privilege and litigation privilege.² The CRA acknowledges that “[it] cannot compel production of material that is subject to solicitor-client privilege or litigation privilege,”³ and accordingly both types of privilege are extremely important in a tax context.

Solicitor-Client Privilege

Solicitor-client privilege (sometimes called “legal advice privilege”) generally protects confidential communications between a lawyer and a client that directly relate to the seeking, formulating, or giving of legal advice. In a tax context, this privilege is most frequently seen in terms of protecting tax planning memoranda and opinions from disclosure demands by tax authorities. Solicitor-client privilege allows a taxpayer to seek advice on tax laws without fear of disclosure of the communications to government agencies. Such free communication is accepted as being essential to a fair justice system and has been described by the Supreme Court of Canada as follows:⁴

²Another variation of privilege that protects correspondence made in furtherance of the settlement of litigation (“settlement privilege”) is not discussed herein.

³See CRA Technical Statement, “Acquiring Information From Taxpayers, Registrants and Third Parties,” June 2, 2010, available at <http://www.cra-arc.gc.ca/tx/tchncl/cqrngnfrmn/menu-eng.html>.

⁴*R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (para. 2). At para. 35, the Supreme Court of Canada goes on to say that “solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance.” See also *LaVallee v. Canada*, 2002 SCC 61.

Solicitor-client privilege describes the privilege that exists between a client and his or her lawyer. This privilege is fundamental to the justice system in Canada. The law is a complex web of interests, relationships and rules. The integrity of the administration of justice depends on the unique role of the solicitor who provides legal advice to clients within this complex system. At the heart of this privilege lies the concept that people must be able to speak candidly with their lawyers and so enable their interests to be fully represented.

Solicitor-client privilege reflects the importance of the role lawyers play in the justice system and the specialized training and expertise in interpreting and applying the law that they possess. Another Supreme Court of Canada decision dealing with privilege describes the rationale for solicitor-client privilege⁵:

The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free, and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

In order for a communication to be protected by solicitor-client privilege, three basic conditions must be met:

- the communication must be between a lawyer and a client with whom the lawyer has a professional relationship, that is, the lawyer must be acting for the client;
- the communication must be intended by the parties to be confidential; and
- the purpose of the communication must be the seeking or giving of legal advice (not other matters, such as business advice).⁶

⁵*Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (para. 26).

⁶In *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (para. 15), the SCC further described the scope of solicitor-client privilege:

Generally, solicitor-client privilege will apply as long as the communication falls within the usual and ordinary scope of the professional relationship. The privilege, once established, is considerably broad and all-encompassing. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, the scope of the privilege was described, at p. 893, as attaching "to all communications made within the framework of the solicitor-client relationship, which arises as soon as the

(Footnote continued in next column.)

Simply giving a document to a lawyer does not cause it to be privileged, nor does a lawyer's presence render a communication privileged (as will be seen further below). The privilege belongs to the client and continues after the solicitor-client relationship has ended and even after the client's death. Solicitor-client privilege may also apply to communications between in-house counsel and others (for example, the company's board of directors) that otherwise meet the three-part test described above, including internal communications passing on confidential legal advice from one employee of the client to another.⁷

The law in Canada is clear that no privilege applies to communications between an accountant and client as such, such as (for example) tax planning communications or the accountant's working papers for preparation of the tax provision in the client's financial statements. For example, in *Tower v. Minister of National Revenue*,⁸ the Federal Court of Appeal explicitly refused to extend privilege to tax accountants:

[37] In 1990, this Court confirmed that an accountant-client privilege does not exist in relation to advice given by an accountant in connection with the search and seizure provisions of the Act [*Income Tax Act*, S.C. 1970-71-72, c. 63, s. 231.3 (as am. by S.C. 1986, c. 6, s. 121)] (see *Baron v. Canada*, [1991] 1 F.C. 688 (C.A.)). The taxpayers say it is now time to recognize a class privilege for communications between tax accountants who provide professional tax advice to their clients in the course of a professional relationship and such privilege should extend to all types of tax advice; income tax, excise tax, goods and services tax, sales tax and real property tax. It is urged that the categories of privilege are not static and can evolve over time, with the identification of a new class on a principled basis (see Lamer C.J. in *R. v. Gruenke*, *supra*, at pages 289-290).

[38] I see nothing in the submissions of the taxpayers that militates against the earlier ruling rendered by this Court in *Baron v. Canada*, *supra*. Solicitor-client privilege is rooted in the proper administration of justice, made necessary by the need for confidential advice in prosecuting one's rights and preparing defences against improper claims (see *R. v. McClure*, [2001] 1 S.C.R. 445, at

potential client takes the first steps, and consequently even before the formal retainer is established". The scope of the privilege does not extend to communications: (1) where legal advice is not sought or offered; (2) where it is not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct.

⁷See, e.g., *Global Cash Access (Canada) Inc. v. The Queen*, 2010 TCC 493 (para. 5).

⁸2003 FCA 307.

paragraphs 31-35). Lawyers are legally and ethically required to uphold and protect the public interest in the administration of justice (see *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, at paragraph 49). In contrast, accountants are not so bound. Nor do they provide legal advice, as to do so would constitute a breach of provincial and territorial laws governing the legal professions. In my analysis, no overriding policy consideration exists so as to elevate the advice given by tax accountants to the level of solicitor-client privilege.

...

[43] Further, the taxpayers have not shown that the tax accountant-client relationship is one that in the opinion of the community ought to be sedulously fostered to the degree that would attract privilege. While confidentiality may be preferred, the tax accountant-client relationship is in no way as fundamental to society and the administration of justice as the solicitor-client relationship.

...

[46] The taxpayers have not shown that any public injury would occur should these tax accountant-client communications continue to be subject to review by the Minister. Innumerable tax accountant-client relationships have functioned fully in the past notwithstanding the Minister's opportunity to review their communications. Whatever the public injury feared by the taxpayers may be, it has not precluded the full and satisfactory maintenance of those past relationships despite the Minister's powers of review. If tax accountant-client communications are subject to the spectre of case-by-case privilege, the harm done to the verification and enforcement of the Act would be considerable, and would outweigh whatever injury, if any, that would inure to such relationships. Overall, in my analysis, the balancing of public interests favours disclosure.

As such, a taxpayer should be prepared to disclose to the tax authorities correspondence with and materials prepared by or for accountants if those tax authorities demand them, and indeed they often contain very sensitive information as to potential exposures. The CRA's policy on demanding access to accountants' working papers is clearly that the CRA may demand to see these materials at any time, and if the "may be relevant" threshold is met, there is unlikely to be any legal basis for refusing to provide them.⁹

⁹See Steve Suarez, "Canada Sets Policy on Accessing Accountants' Working Papers," *Tax Notes Int'l*, June 21, 2010, p. 935. See also the CRA statement, *supra* note 3:

In the context of this policy, "any other person" includes tax professionals and tax preparers, and "any document" includes accountants' and auditors' working papers that

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As an exception to this general rule, the jurisprudence supports the position that in considering the three-part test described above, communications "between a lawyer and client" can include a third party acting as an agent for either the lawyer or the client (for example, "client" should be read as including someone acting as the client's agent). If an accountant acts as agent for a client in obtaining legal advice from a lawyer, communications between a lawyer and the accountant, and communications between the accountant and the client regarding that advice, should be privileged.

Also, if an accountant is retained to assist the lawyer in providing legal advice to the client, communications between the lawyer and the accountant may also be privileged. One of the seminal authorities on this issue in Canada is *Susan Hosiery Limited v. Minister of National Revenue*, which describes how an accountant may act as the client's agent in obtaining legal advice from a lawyer.¹⁰ Subsequent jurisprudence has established the importance of identifying the true nature of the function being played by the third party (such as an accountant) in interacting with the lawyer and client. As a general rule, the case law supports the extension of solicitor-client privilege to include the third-party agent when either:

- the agent is acting as a conduit or messenger in passing information between the lawyer and client that would otherwise have been privileged had it been passed directly from lawyer to client;¹¹ or
- the third party's retainer extends to a function that is essential to the existence or operation of the client-solicitor relationship, in which case "the

relate to a taxpayer's books and records and that may be relevant to the administration or enforcement of the ITA, ETA, and other relevant legislation. Accountants' and auditors' working papers include working papers created by or for an independent auditor or accountant in connection with an audit or review engagement, advice papers, and tax accrual working papers (including those that relate to reserves for current, future, potential or contingent tax liabilities).

¹⁰69 DTC 5278, at p. 5283 (Exchequer Court):

where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an accountant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.

¹¹For example, in *Susan Hosiery*, the client's financial advisers assembled required information and "translated" it into terms that the lawyer could understand.

privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.”¹²

The latter test may be met, for example, when a tax lawyer retains an accountant to perform some function (for example, preparing a report) that the lawyer can in turn use in formulating and delivering legal advice to the client. As such, in some circumstances the scope of solicitor-client privilege may be extended to include the involvement of an accountant or other third party in the delivery of the lawyer’s advice to the client. The distinction has been described thus¹³:

If the [accounting firm] tax team provided advice to the client or to its solicitor that advice would not be privileged. It is only in the very limited situation where the tax team provides information to the solicitor for the purpose of the client’s receiving legal advice that the privilege can be maintained. This is not the creation of an accountant-client privilege but the acknowledgement of an extension of solicitor-client privilege through the principles of agency. If advice given by the tax team, which cannot be protected by the agency because it is not given for the purpose of obtaining legal advice, turns up in the auditor’s file it is clearly not privileged.

Care must be taken in these circumstances, however, as the exact scope of this extension of privilege is not entirely clear and depends on the facts of each case. If the accountant is acting as an agent of another person and is either communicating privileged information or being retained to perform a specific service in furtherance of the provision of the lawyer’s own legal advice, this should be clearly evidenced at the outset to remove all doubt.¹⁴

¹²*General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (Ont. CA).

¹³*Cineplex Odeon Corporation v. The Queen*, 94 DTC 6407, at 6409 (Ont. C.J.).

¹⁴See also *Imperial Tobacco Canada Limited v. The Queen*, 2013 TCC 144. See also *Long Tractor Inc. v. Canada (Deputy Attorney General)*, 1997 11172 (SK QB):

It is clearly recognized that in communicating with the solicitor for the purpose of obtaining legal advice in such contexts as this, the client must of necessity rely upon the expertise of his accountants to explain to the solicitor intricacies of his situation which he may not himself be competent to explain. The accountant therefore speaks as agent or representative of the client because, (a) he is exercising his expertise on behalf of the client to communicate the complexities of the client’s factual situation to the solicitor for the purpose of obtaining legal advice for the client, and (b) in so doing, he is acting in a relationship of confidence, vis-a-vis, the client, arising out of his professional relationship with the client.

Litigation Privilege

Litigation privilege applies only to communications made and materials prepared when litigation is contemplated, anticipated, or ongoing. In that sense, it is narrower than solicitor-client privilege. However, it applies not only to communications between a lawyer and client but also to communications between a lawyer and third parties (including accountants), a client and third parties, and to materials other than communications (for example, expert opinion or analysis) prepared by non-lawyers. The rationale for litigation privilege is different than that for solicitor-client privilege¹⁵:

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

For litigation privilege to attach to a communication or document, the communication must be made or the document must be created:

- in the course of or in anticipation of litigation; and
- for the dominant purpose of preparing for such actual or reasonably anticipated litigation.

As noted, litigation privilege is not restricted to communications between the lawyer and client (or their respective agents), and an expectation of confidentiality is not a prerequisite (for example, interviews with witnesses who are expected to later testify may still be privileged). Interview notes, investigative reports, and expert reports are all examples of materials that may

¹⁵See R.J. Sharpe, “Claiming Privilege in the Discovery Process,” in *Special Lectures of the Law Society of Upper Canada* (1984), 163, at pp. 164-165, as cited in *Blank, supra* note 5, at para. 28. See also *Blank*, at para. 27:

Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

be protected by litigation privilege. Moreover, litigation privilege ends once the litigation is over and no closely related litigation is anticipated.

Waiver

Privilege that is successfully established can be lost when it has been waived. As a general rule, a deliberate disclosure of the relevant information to a third party will constitute a *prima facie* waiver of privilege. Waiver can be express or by implication: For example, specific statements that put the client's knowledge of the law or state of mind in issue (for example, stating that a legal opinion was obtained) may be found to constitute an implied waiver of privilege¹⁶:

The jurisprudence supports the following propositions relating to implied waiver of the privilege:

- (a) waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd* (1983), 35 CPC 146, 45 BCLR 218 (SC) (S & K);
- (b) where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost. (S & K);
- (c) in cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. (S & K);
- (d) the privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. *Bank Leu Ag v Gaming Lottery Corp.*, [1999] OJ No 3949 (Lexis); (1999), 43 C.P.C. (4th) 73 (Ont. S.C.) at paragraph 5;
- (e) the onus of establishing the waiver rests on the party asserting waiver of the privilege. (S & K at paragraph 10).

That being said, not all disclosures will constitute a waiver of privilege. To begin with, a disclosure made without the client's express or implied consent has been held not to constitute a waiver of privilege. Since the privilege belongs to the client, it follows that a disclosure made without the client's consent should not vitiate the client's privilege.

An example of this is the *Cineplex Odeon* case, in which tax accountants at the client's external auditor provided privileged materials to their audit counter-

parts within the accounting firm. The Court ruled that the accounting firm had "no power or right to waive the legal privilege"¹⁷ in the relevant documents and that disclosure had not been authorized by the client. As such, no waiver of privilege occurred.

Furthermore, Canadian courts have recognized a doctrine of so-called "limited waiver" when a corporation is compelled to disclose otherwise privileged documents to its external auditors under applicable corporate law. In such circumstances, privilege generally is waived only for the external auditor and preserved against the rest of the world, and the CRA is not able to require disclosure to it. For example, in *Philip Services Corp. (Receiver of) v. Ontario Securities Commission*, the Court stated:

disclosure to the auditors for their purposes is not properly disclosure to the world, because of the great importance of the solicitor-client privilege to the proper functioning of the legal system. The documents were sought by Mr. Kesler because Deloitte was the auditor and were given to him in that capacity. It would be contrary to the basis of the decisions in *Descôteaux, supra*, and *Lavallee, infra*, to extend the scope of that disclosure to the world.¹⁸

Moreover, inadvertent disclosure has also been held not to amount to a waiver of privilege, depending on the circumstances. For example, in another case involving the receipt of privileged legal opinions by the taxpayer's auditors, it was unclear how or why the accounting firm had come into possession of these documents, and hence the facts did not come within the limited waiver doctrine described above.¹⁹ However, the Court was nonetheless satisfied that the client had not intended to waive privilege, was not aware that the accounting firm had obtained copies of the privileged documents, and had not acted carelessly. This being so, and given that the taxpayer had moved swiftly to assert privilege upon learning of the inadvertent disclosure, the Court exercised its discretion in favor of maintaining the client's privilege.

Finally, in some cases it is also possible for different persons with a "common interest" to share legal advice they have obtained toward a shared objective (for example, completing a business transaction or mounting a joint defense) without waiver being considered to

¹⁷*Supra* note 13, at 6409.

¹⁸[2005] O.J. No. 4418 (Ont. Div. Ct.) at para. 47. At para. 92:

In summary, I conclude that all of the Disputed Documents were *prima facie* privileged; that the provision of copies to Deloitte in its capacity as auditor did not waive the privilege for all purposes, but only to the extent necessary to enable Deloitte to carry out its audit functions.

¹⁹*Minister of National Revenue v. Grant Thornton et al.*, 2012 FC 1313 (FCTD).

¹⁶*Re Mahjoub*, 2011 FC 887 [para. 10]; as cited in *Gerbro Inc. v. The Queen*, 2014 TCC 179 [para. 50].

have occurred. While this is sometimes referred to as “common interest privilege,” it is more properly thought of as a non-waiver of already established privilege.

The justification for maintaining privilege in the context of commercial transactions is ensuring that the transactions can be completed without undue impediments.²⁰ The same principle applies to the sharing of privileged materials among different entities within a corporate group.²¹ In order for this doctrine to apply, the underlying document must be privileged, and disclosure to the other persons must have been made on a confidential basis in furtherance of a common interest and without an intention to waive privilege.²²

There are various steps that taxpayers can take to prevent an unintended waiver of privilege, including the following:

- limiting dissemination of privileged documents to the smallest number of people necessary;
- clearly marking privileged documents as “Privileged & Confidential” and storing them separately from other documents;²³
- consulting legal counsel before disclosing the existence of or providing a copy of privileged documents to other persons; and

²⁰See, e.g., *Fraser Milner Casgrain LLP v. M.N.R.*, 2003 DTC 5048 (B.C.S.C.):

[T]he economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.

²¹See *Imperial Tobacco Canada Limited*, *supra* note 14.

²²See, e.g., *Archean Energy Limited et al. v. M.N.R.*, 98 DTC 6456 (Alta. Q.B.) at para. 30:

It is argued for the Minister that the vendors and the purchaser are adverse in interest and thus the release of privileged information to a party adverse in interest is a waiver. However, the parties to a commercial transaction are not adverse in interest in the same sense that parties to litigation are. In fact, parties to a commercial transaction have a common interest in seeing the deal done. That is particularly so where the companies are related by some common shareholders or management as is said to be the case here. In any event, Eagle, the client to whom the legal opinions are primarily directed, is not a vendor as defined by the agreement. It is a reasonable inference that Eagle instructed its solicitors to provide the opinion in order to further the reorganizations and not with the intent to waive privilege. The burden of proving waiver lies upon the party who alleges it. On the facts before me I am not satisfied that waiver has been shown.

²³It is distressingly common to see privileged documents or references to privileged documents included in corporate minute books and other records that are themselves unprivileged.

- ensuring that any required disclosure is clearly identified as having been made for a limited purpose or in furtherance of a common interest, and not as a general waiver of privilege.

Zeldap

A recent ruling by the Tax Court of Canada illustrates how easily the CRA is able to obtain potentially sensitive information that is not protected by lawyer-client privilege. In *Zeldap Corporation v. The Queen*,²⁴ the Court considered whether the taxpayer should be required to answer some written questions as part of the Crown’s examination for discovery of the taxpayer’s president (Dr. Pona). The taxpayer had appealed the CRA’s March 29, 2011, reassessment of the taxpayer’s 2003-2006 tax years to the Court. The taxpayer’s book of documents provided to the Crown as part of the pretrial process included a letter dated December 18, 2007, from an accountant (Mr. Stebila) to Pona, which made reference to previously held “meetings and discussions.”²⁵ On seeing this reference, the Crown asked the taxpayer to respond to the following questions as part of the examination for discovery:

Question 32.

Having regard to the meetings and discussions referenced in the document reproduced under tab 37 of the appellant’s book of documents,

a) when and where was each such discussion held?

b) between whom was each discussion?

c) who else, if anyone, was present for each discussion? Please provide their full names and contact information.

d) what was said?

...

g) were any records created diarizing any part of the discussion, and if so, please produce any and all copies of the same or make your best efforts to obtain and produce the same, including making requests of parties who might reasonably be expected to have copies of the same (should your best efforts fail, please describe what efforts were taken)?

The taxpayer refused to answer these questions on the basis that litigation privilege applied, attesting that:

²⁴2015 TCC 78; available at <http://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/108838/index.do>.

²⁵The first paragraph of the 2007 letter reads:

This letter is further to the meetings and discussions we have had regarding various loans and investments made (*sic*) Zeldap Corporation (“Zeldap”) during the years 2003 to 2006 and how these loans and investments are to be reported in the Zeldap financial statements and corporation income tax returns for these years.

- Pona met with the accountant “under the direction of his then lawyer, Scott Sullivan, in contemplation or anticipation of possible litigation”; and “every meeting took place in Mr. Sullivan’s office with Mr. Sullivan being present at each meeting.”
- On this basis, the taxpayer “submitted that a *prima facie* case has been made that the meetings took place for the dominant purpose of contemplation or anticipation of litigation and that, at all material times, the meetings with Mr. Stebila were under the direction of his lawyer, Mr. Sullivan, only after seeking his legal advice and in compliance with that legal advice. [para. 9]”

In rejecting this claim, the Court observed that the meetings referred to in the December 2007 letter occurred more than three years before the CRA reassessed the taxpayer. As such, it was not obvious why litigation was anticipated at the time of these meetings. Moreover, no information was put forth as to what legal advice was being sought from Sullivan at these meetings.²⁶ This being so, litigation privilege was found not to apply, and the Court ordered the taxpayer to answer the Crown’s questions.

This case illustrates a number of interesting points. First, taxpayers are often encouraged to communicate verbally rather than in writing with non-lawyer advisers such as accountants, in order to minimize the creation of non-privileged and potentially sensitive documents. While this advice remains valid, it has its limits, as this case demonstrates. Once the Crown became aware of the meetings and discussions in question, it demanded to know the content of them, since the communications were determined not to be protected by lawyer-client privilege. Hence, the primary lesson from this case is that a taxpayer should be prepared to disclose to the tax authorities the details of all communications (even verbal) between the taxpayer and its accountants.

Unless the accountant is acting as an agent of the taxpayer or its lawyer in the manner described above so as to be included within the scope of a solicitor-client communication, or the circumstances are such that litigation privilege applies, taxpayers should be prepared to disclose to the tax authorities all the details of their interactions with non-lawyer tax advisers. The only way to ensure that tax advice (even verbal tax advice) is protected from disclosure is to obtain it from a tax lawyer.

²⁶At para. 11:

The fact that Mr. Sullivan was present at the meetings between Mr. Stebila and Dr. Pona does not necessarily mean that the dominant purpose of the meetings was in respect of an existing, contemplated or anticipated litigation. A lawyer’s presence at a meeting is not indicative that his legal advice was being sought. The appellant has not provided any information concerning the nature of the legal advice sought from Mr. Sullivan.

Second, this case demonstrates how little it takes for tax authorities to obtain potentially sensitive information. In *Zeldap*, a relatively innocuous letter referring to previous “meetings and discussions” was enough to open the door to full disclosure of the content of those meetings and discussions. Since the letter itself was not privileged, there was nothing preventing the CRA from reviewing it on audit, meaning that document management was of limited help.

Again, the lesson is that unless the original communications (the meetings and discussions, in this case) are protected by lawyer-client privilege, hoping that they won’t be disclosed to the CRA because the CRA won’t learn of them is a very risky course of action. Tax authorities have the tools to obtain almost anything that may be relevant to disputed tax issues.

Finally, the case raises (but does not ultimately address) the interesting question of when litigation privilege might begin in the context of a tax dispute:

- when the taxpayer takes a position known to be contrary to CRA administrative policy or likely to be challenged;
- when an audit begins;
- when the CRA issues a proposal letter or a reassessment; or
- only when an appeal to the Tax Court is launched?

In *Zeldap*, the Court disposed of the litigation privilege claim because there was simply no evidence of the substantive involvement of a lawyer in the issues in question, making it unnecessary to consider whether litigation was reasonably anticipated at that time (and rather difficult to show that the “dominant purpose” of the meetings and discussions was contemplated litigation). Relatively little authority exists on when litigation privilege might begin in the context of tax planning, although what there is suggests that simply taking a contentious position (much less having a preliminary discussion about doing so) may not suffice to meet the dominant purpose test.²⁷ The most taxpayer-friendly authority is likely *Crown Zellerbach Canada Limited v. Attorney-General (Canada)*,²⁸ in which the Court made the following statement:

In the context of dealings between a taxpayer and Revenue Canada, I think it clear that litigation may be definitely in prospect prior to any formal legal step such as a reassessment being taken. It may be when the Minister, by word or deeds (such as the implementation of a field audit), gives a definite indication of not accepting the

²⁷See Alexandra Brown and Roger Taylor, “A Practical Guide to the Audit and Audit Issues,” *Report of the Proceedings of the Fifty-Ninth Tax Conference, 2007 Conference Report* (Toronto: Canadian Tax Foundation, 2008), 17:7-8.

²⁸82 DTC 6116 (B.C.S.C.).

position set out in the return. Or it may be at an earlier stage, at which there may have been no communication between the taxpayer and the department, but where the former recognizes the existence of a possible issue. The question is one as to what was in the mind of the person claiming privilege.

However, as has been noted elsewhere,²⁹ this case predates the Supreme Court of Canada’s decision in *Blank*, and even when litigation is anticipated, it remains necessary in each case for the communication to meet the dominant purpose test. As such, while there may be little to lose in trying to assert litigation privilege to protect preexisting tax planning communications between taxpayers and non-lawyers that tax authorities demand to see,³⁰ as a practical matter, taxpayers would be ill-advised to rely on litigation privilege to protect such communications.

²⁹ See Trent Henry and Andrew Kingissepp, “Managing the Confidentiality of Tax Accrual Working Papers,” *Report of the Proceedings of the Sixty-First Tax Conference*, 2009 Conference Report (Toronto: Canadian Tax Foundation, 2010), at 29:20.

³⁰ Tax planning communications between tax lawyers and taxpayers would generally be protected by solicitor-client privilege.

Conclusion

Lawyer-client privilege is a powerful protection available for communications arising out of the lawyer-client relationship. It is particularly valuable in the tax planning context, as it allows a taxpayer the ability to obtain a full and candid assessment of the strengths and weaknesses of different tax planning alternatives without fear of that advice being disclosed to tax authorities. Persons involved in tax planning are well advised to structure their affairs to come within the scope of lawyer-client privilege whenever possible and to ensure that such privilege is preserved and not waived.

Lawyers and accountants bring different strengths to their clients, based on their different training and expertise. Canada’s top tax practitioners include a number of non-lawyer accountants who possess impressive knowledge of Canadian tax rules.

However, because they are not practicing law (which accountants, immigration consultants, estate planners, and other non-lawyer advisers are not legally authorized to do) and are not subject to the same regulatory regime and client protections that lawyers are, they cannot create the lawyer-client privilege that is reserved for lawyers. Taxpayers are best served by understanding the different strengths that lawyers and accountants bring to tax issues, and using them accordingly (quite often together) as the circumstances warrant. ♦

Lawyer-Client Privilege in Canada: Summary

	Solicitor-Client Privilege	Litigation Privilege
Purpose	Allow candid discussion of legal rights and obligations (protects <i>relationship</i>)	Allow investigation and preparation of case for litigation (protects <i>process</i>)
Requirements	Communication/document <ol style="list-style-type: none"> made between a lawyer and the lawyer’s client intended to be confidential made for the purpose of seeking or giving legal advice 	Communication/document <ol style="list-style-type: none"> made in the course of or in anticipation of litigation made for the dominant purpose of that litigation
Duration	Indefinite	Until conclusion of litigation (including closely related litigation)
Third-Party Communications May Be Included	Only if third party acting as agent of client/lawyer in obtaining or delivering lawyer’s legal advice	Yes, if otherwise meeting litigation privilege requirements