

Accountants and “Client Privilege”

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As a general rule, a client who communicates with a lawyer for the purpose of obtaining legal advice can rest assured that the lawyer will not divulge the content of the communication to any third party and that no third party — including the CCRA — will be entitled to read, obtain or use such a communication against the client. Under Canadian law, solicitor-client privilege is “a principle of fundamental justice” and an important civil right. The purpose of privilege is to ensure that a client can be open and frank with his or her lawyer so that the lawyer, in turn, can properly advise the client about his or her legal rights and responsibilities. Solicitor-client privilege belongs to the client and can only be waived or given up by the client.

In general, communications between an accountant and the client are not privileged. In *Tower v. M.N.R. and BDO Dunwoody LLP*, [2002] D.T.C. 7315 (F.C.T.D.), rev’d 2003 FCA 307 on other grounds, the court was asked to decide whether certain communications between BDO and a client were privileged. The client had decided to emigrate from Canada, and BDO provided tax advice to help the client minimize departure taxes. Later, the CCRA requested copies of certain documents in BDO’s files that the CCRA claimed were relevant to its audit of the client’s affairs. The client, supported by BDO, applied to the Federal Court for an order stating that they were not required to provide the BDO documents because they were privileged. The Federal Court held that the documents were not privileged. The Court followed a long line of cases that held that communications between accountants and their clients were not privileged. In the opinion of one judge, solicitor-client privilege “is recognized because it is necessary for the proper administration of justice” while confidentiality between accountants and their clients “is not founded upon a need to ensure an effective system of the administration of justice.” In the judge’s view, “the accountant does not represent the client with respect to the administration of justice”.

Tax accountants play a key role in providing advice to Canadian taxpayers. In practice, the nature of that advice generally differs very little from the advice provided by tax lawyers: both kinds of professionals provide advice to clients on their legal rights and responsibilities under the *Income Tax Act* (Canada). It is unfortunate that the Courts in *Tower* refused to recognize this reality. In the United States, Congress amended the *Internal Revenue Code* to extend privilege to communications with accountants who are “federally authorized” tax practitioners. The Federal Court of Appeal in *Tower* took notice of this policy but refused to give any weight to it on the grounds that it is for Parliament to choose to enact a similar rule in Canada.

Nevertheless, accountants have an important role to play in ensuring that privilege is available to protect their clients. The courts have held that certain communications between a client and his accountant *are* privileged. Sometimes, a client will want an opinion or advice on a tax matter from a lawyer. The client, however, will likely need his accountant’s help in obtaining that advice: the

accountant can communicate best to the lawyer the client's circumstances and concerns. When the accountant acts as the client's agent to obtain legal advice, the accountant's communications with both the client and the lawyer for the purpose of obtaining that advice will be privileged.

Accountants can also play a role in helping clients to protect their privileged documents. Sometimes clients fail to appreciate the significance of privilege and how easily it can be lost. Sometimes a client will go to the trouble of obtaining legal advice, in part to ensure that its communications in respect of that advice are privileged, and then lose that privilege because, for example, an employee volunteers a copy of a privileged document to a CCRA auditor.

What practical steps can an accountant take to help ensure that its client's communications are protected by privilege?

- If the accountant is acting on behalf of a client to obtain legal advice, the accountant should ensure that this relationship is documented so that it is clear that the accountant is acting as an agent of the client for this purpose. This will help to ensure that communications between the client and the accountant and the accountant and the lawyer for the purpose of obtaining this advice will be privileged.
- The accountant should ensure that *all* privileged communications are easily identifiable as such by some notation (preferably in colour) on their face. "Privileged communications" does not mean just letters. It could also include notes on telephone calls or meetings between the accountant and the lawyer for the purpose of obtaining legal advice for a client. "Privileged communications" could even include a lawyer's notes or annotations on draft legal agreements.
- Privileged communications should be stored in files separately, perhaps in coloured envelopes that are marked as containing privileged documents and that contain instructions on their face not to provide copies of the contents to any third party, including the CCRA, without consulting first with a senior accountant in the office.
- No one should make unnecessary copies of privileged communications, and no one who receives such a communication should be permitted to make a copy and send it to another person without first obtaining legal advice. Providing copies of a privileged communication to a third party can result in a loss of privilege.
- A tax accountant should not assume that privileged communications can be provided to his or her audit colleagues without endangering the client's privilege. The tax accountant should consult with a lawyer before providing copies of such communications to the auditors.
- The accountant should ensure that the client also follows the procedures outlined above.

For a detailed analysis of the issues outlined above — albeit an analysis conducted before the decision in *Tower* — see Gloria Geddes, "The Fragile Privilege: Establishing and Safeguarding Solicitor-Client Privilege" (1999) 47:4

Can. Tax J. 799-843.

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