

Accountants' Privilege

BACKGROUND

- Under the *Income Tax Act*, CRA has authority to initiate broad requests for information from accountants. Despite this authority, CRA's policy has traditionally excluded working papers from "routine" requests. This approach was set out in CRA's guidelines for obtaining information from accountants. In 2004, the Federal Court of Appeal in *Kitsch* confirmed the absence of accountant privilege, leaving the door open for broad requests of working papers by CRA. The Court added that the enactment of a class of privilege would be up to Parliament.
- In 2004, CICA wrote to CRA, urging it to exercise self-restraint in requesting accountants' working papers. CICA lists two harms in requiring disclosure:
 - Risk of disclosure discourages open and frank communications between accountants and their clients and thereby impairs the proper functioning of the self-reporting tax system and results in incomplete disclosure and compliance.
 - Risk of disclosure impairs an accountant's ability to access to information required for high quality audits and thereby undermines public confidence in the capital markets.
- CBA's policy is that solicitor-client privilege is a fundamental, foundational element of our justice system and strives to ensure its rigorous protection against any potential infringement. The four Wigmore conditions are the framework for determining a common law privilege. These conditions are as follows:
 1. The communications must originate in a confidence that they will not be disclosed;
 2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
 3. The relation must be one which in the operation of the community ought to be sedulously fostered; and
 4. The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
- Current jurisprudence indicates that the proper approach to determine privilege is on a case-by-case basis.
- In 2004, the CBA Intellectual Property Section responded to an Industry Canada discussion paper, opposing a statutory privilege for patent agents. CBA argued that if patent agents are properly performing administrative work and not practicing law, their communications do not meet the criteria for privilege under the *Wigmore* test.
- In the MDPs context, CBA urged Law Societies to require MDPs to advise clients if the firm includes professionals (like accountants) not subject to the legal profession's values, obligations, standards, and rules, including solicitor-client privilege.
- From an international perspective, CRA's broad access policy is inconsistent with recent efforts in Australia, the United States, the United Kingdom, and New Zealand to limit the tax

authority's ability to request disclosure of information from tax payers except in clear and well-defined special circumstances.

- In the US, the IRS has traditionally exercised self-restraint. There is no common law privilege for accountants, but a limited statutory privilege was extended in 1998 to communications between taxpayers and authorized tax practitioners. It applies to communications that would have been privileged had they been between a taxpayer and an attorney. The privilege does not apply in cases of fraud or criminal activity.
- In Australia, a self-restraint policy is also promoted. The Australian Taxation Office (ATO) recognized an "accountant's concession" in 2005: "[w]hile recognizing that the Commissioner has the legislative power to request access to most documents, it is accepted that there is a class of documents which should, in all but exceptional circumstance, remain within the confidence of taxpayers and their professional accounting advisors". The exceptional circumstances include suspicion of fraud, evasion or other offenses; where the source documents do not provide sufficient information to properly evaluate a taxpayer's arrangements; and where source documents have been lost or destroyed or are otherwise unavailable.
- In the UK, there is statutory authority for broad requests for working paper but the Inland Revenue has rarely sought access to accountants' working papers. The British Parliament extended a limited form of statutory privilege to accountants in 1989.
- In 2005, NZ introduced a statutory non-disclosure right for certain communications between tax advisors and their clients. Tax advisors must be members of an advisor group approved by NZ Inland Revenue. Documentary communication between tax advisors and their clients is protected if the main purpose for creation of the document was to give or receive tax advice on tax laws. Exclusions are for information of a factual nature, accounting and tax work papers, non-tax advice such as valuation and investment advice, matters relating to debt recovery and illegal or wrongful acts.

CURRENT STATUS

- CRA's practice has changed recently, to be more proactive in requesting access to accountants' and auditors' working papers.
- CICA has objected to this change.
- CBA issued a discussion paper by Professor Adam Dodek in February 2011, entitled *Solicitor-Client Privilege in Canada: Challenges for the 21st Century*. The paper identifies issues likely to arise as other professionals seek privilege, and addresses the difficulties for lawyers to oppose that extension on principled grounds.

NEXT STEPS

- Legislation and Law reform staff will monitor further developments.