In light of the recent Tax Court of Canada decision, *Zeldap Corporation v. Her Majesty the Queen*,[1] ("*Zeldap*") this paper discusses the concept of privilege, particularly as it relates to communications between lawyers, taxpayers and accountants, in the context of the *Income Tax Act* (Canada) (the "*Act*") and in dealing with the Canada Revenue Agency.

In *Zeldap*, the Minister of National Revenue (the "*Minister*") made an application to the court to compel *Zeldap* Corporation (the "*Appellant*") to answer questions served to it in written examinations for discovery. The questions were in respect of the time, location, identities of parties participating in, matters discussed and the production of any records diarizing any part of meetings and discussions which the Vice-President of the Appellant and a Chartered Accountant had regarding certain loans and investments made by the Appellant during 2003-2006 and how such loans and investments were to be reported in the Appellant's financial statements and corporate income tax returns for those taxation years. The Minister became aware of such meetings and discussions through a paragraph in a letter (the "*Letter*") contained in the Appellant's Book of Documents.

The Appellant refused to answer the Minister's questions with respect to the meetings and discussions referenced in the Letter on the grounds that the communications were subject to solicitor-client privilege. The Appellant's basis for this position was that the Vice-President of the Appellant met with the Chartered Accountant under the direction of the Vice-President's lawyer in contemplation or anticipation of possible litigation and that every such meeting took place in the lawyer's office, with the lawyer being present at each such meeting. That is, the Appellant refused to answer the Minister's questions on these points on the grounds that the communications were subject to litigation privilege.

The Appellant argued that test in *Kennedy v. McKenzie*,[2] ("*Kennedy*") applied to determine whether litigation privilege existed. In *Kennedy*, the Court held that the party asserting litigation privilege must establish that the documents over which privilege is claimed were created:

(a) for the dominant purpose of existing, contemplated or anticipated litigation; and

(b) in answer to inquiries made by an agent for the party's solicitor; or

(c) at the request or suggestion of the party's solicitor; or

(d) for the purpose of being laid before counsel for the purpose of obtaining his advice; or

(e) to enable counsel to prosecute or defend an action or prepare a brief.

The onus of establishing that a document is subject to litigation privilege rests on the party asserting the privilege. The Appellant's position was that a *prima facie* case had been made that the relevant meetings took place for the dominant purpose of contemplated or anticipated litigation and that, at all material times, the meetings with the Chartered Accountant were under the direction of the Vice-President's lawyer, only after seeking his legal advice and in compliance with that legal advice.

In *Zeldap*, the Tax Court of Canada found that the Appellant failed to establish a *prima facie* case for litigation privilege to apply and, as such, the Minister's application was granted.

In reaching its conclusion, the Court found that no case had been made that the dominant purpose of the relevant meetings was in respect of existing, contemplated or anticipated litigation, ruling that no information had been given in this respect. Moreover, the Letter was dated December 18, 2007 and referred to loans and investments and the manner of reporting of these loans and investments for the 2003-2006 years. However, most of the meetings and discussions to which the Letter referred seemed to have occurred in 2007, more than three years before the 2003-2006 years were reassessed by the Minister on March 29, 2011. According to the Court, the Appellant provided no explanation why litigation was anticipated at that time (i.e., in 2007).

The Court also stated clearly that the fact that the lawyer was present at the meetings between the Chartered Accountant and the Vice-President did not mean that the dominant purpose of the meetings was in respect of existing, contemplated or anticipated litigation and that a lawyer's presence at a meeting is not indicative that his/her legal advice is being sought. As well, the Court found that the Appellant had not provided any information regarding the nature of the legal advice sought from the lawyer.

Thus, in *Zeldap*, the Court found that the Appellant failed to establish the first criteria from *Kennedy* for asserting litigation privilege in respect of the discussions and documents referred to in the Letter.

The decision in this application should serve as a strong reminder about the circumstances in which litigation privilege (and, in the broader context, solicitor-client privilege, including common interest privilege)[3] may or may not be found to apply to discussions, communications and disclosures of such discussions and communications involving a client, a lawyer and a third party (such as an accountant).

The decision in *Zeldap* is in line with other decisions on the subject of privilege. Fundamentally, subject to certain exceptions, advice provided by accountants to clients is not privileged. In *Susan Hosiery Ltd. v. Minister of National Revenue*,[4] ("*Susan Hosiery*"), the Exchequer Court summarized principles that apply with respect to privilege, documents prepared by accountants and disclosure to accountants as follows:

Applying these principles, as I understand them, to materials prepared by accountants, in a general way, it seems to me...
In respect of the extension of solicitor-client privilege to third party communications (with, for example, accountants), this depends upon:

...the true nature of the function that the third party was retained to perform for the client.[6]

Another example of the denial of solicitor-client privilege with respect to communications with external accountants occurred in a motion brought by the Minister in Imperial Tobacco Canada Ltd. v. R.[8] ("Imperial Tobacco Canada"). In this case, British American Tobacco p.l.c. ("BAT") was the parent company of numerous companies, including British American Tobacco Australia Ltd. ("BATA"), BAT Australia Investments Ltd. ("BATI"), and Imperial Tobacco Canada Ltd. ("Imperial Tobacco"), the appellant in this matter. In 2001, Imperial Tobacco acquired preferred shares of BATA for a subscription price of $483,910,000. In 2003, Imperial Tobacco acquired preferred shares of BATI for a subscription price of $879,535,000. Though not described in the decision, owing to these acquisitions, BATA and BATI became foreign affiliates, for the purposes of the Act, of Imperial Tobacco. BATA and BATI paid dividends to Imperial Tobacco from their exempt surplus accounts, with the result that the dividends were not subject to Canadian income tax. The Minister disallowed approximately $600,000,000 which Imperial Tobacco had deducted in respect of the dividends received from BATA and BATI. The issue in the appeal was whether paragraph 95(9)(b) of the Act applied to the relevant transaction.[9]

Imperial Tobacco's List of Documents listed emails between various legal counsel and employees of Imperial Tobacco, BAT, and BATA. However, certain legal communications were also revealed by Imperial Tobacco, BAT and BATA to an Australian accounting firm, which appeared to have been retained by BATA. Imperial Tobacco argued that solicitor-client privilege extended to communications with the Australian accounting firm on the basis that the accounting firm's input was necessary to the provision of legal advice by legal counsel.

The Court, in Imperial Tobacco Canada, rejected this assertion with respect to certain emails which were sent by employees of BAT and/or Canadian counsel to other employees of BAT, Imperial Tobacco, BATA, Canadian and foreign legal counsel and individuals at the Australian accounting firm. In respect of these emails, the Court found the excerpts from a number of the documents in respect of which Imperial Tobacco was claiming privilege did not establish that the Australian accounting firm's role extended to a function which could be said to be integral to the solicitor-client relationship. The Court found that, based on the documents provided to it, there was no description of the relationship between the accounting firm and BATA, the documents made little reference to the accounting firm and the documents did not describe any accounting information that could only be provided by the Australian accounting firm. In fact, the Court found that Imperial Tobacco and its affiliates had employees who were very knowledgeable with respect to accounting matters and offered as an example a document, which appeared to have been prepared by employees of the affiliated companies, containing a very detailed analysis of accounting issues.

In short, the Court found that the evidence provided by Imperial Tobacco with respect to the role of the Australian accounting firm did not establish that the accounting firm's role extended to any function which could be said to be integral to the solicitor-client relationship. In the Court's view, the relevant emails illustrated that Imperial Tobacco and its affiliates were large, well-staffed and sophisticated, did not reference the Australian accounting firm, its relationship with BATA, the reason for the accounting firm's involvement in the matter or why the accounting firm's involvement was required in order to provide legal advice. Thus, the Court ruled, the majority of the emails which were sent to, among others, the Australian accounting firm constituted a disclosure of such emails to a third party of which BATA and BAT were aware (i.e., the disclosure was not inadvertent) and such emails were not subject to solicitor-client privilege.

The key to the Court's decision on this point appears to have been the fact that, in its opinion, there was no evidence that the Australian accounting firm's involvement in the matter was required in order for legal counsel to provide advice to its client. However, what appears equally clear is that there was a lack of evidence provided to the Court regarding the accounting firm's role and had more evidence been provided, it is possible that the Court would have reached a different conclusion.

For example, Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)[10] ("Mutual Life Assurance") involved an application by Mutual Life Assurance Co. of Canada ("Mutual Life") under section 232 of the Act[11] for orders respecting a number of documents seized and placed in the custody of the Deputy Sheriff of the judicial district of Waterloo. Mutual Life asserted that such documents were subject to solicitor-client privilege. One of the documents at issue was a letter from a lawyer at a law firm to an employee of Mutual Life, enclosing a memorandum headed "Professional Communication..." which was described in the lawyer's covering letter as being the professional communication of the law firm and a firm of chartered accountants. The Court described the document as follows:

The memorandum related to the venture with Ship Corporation Limited and contains advice as to the effect of various arrangements with respect to the project on the tax liability of the participants. The memorandum appears to me to be full of legal advice respecting the tax liability of participants in the project. It is common knowledge that chartered accountants and lawyers frequently must work together in advising clients as to the effect on particular projects of extremely complex provisions of our Income Tax Act. It is impossible to me to tell in reading the memorandum what portion of it is attributable to the chartered accountants and what portion of it is attributable to the solicitors.[12]

In Mutual Life Assurance, the Court found that by sending the memorandum with the covering letter, the solicitors had accepted responsibility for the significant legal advice contained in the memorandum. For this reason and because it appeared to the Court that all the advice in the memorandum could be described as legal in that it involved advice regarding the impact of income tax laws, the law firm was responsible for the entire document, even though the law firm acknowledged input from the chartered accountants. Thus, the letter and memorandum were communications protected by solicitor-client privilege.
By way of contrast, the Court in Susan Hosiery stated as follows:

(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly relating to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and

(b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.[13]

Such privilege between a lawyer and a client is permanent and can only be waived by the client.[14]

A lesson from the Zeldap decision and other decisions referenced in this article is the importance, from the perspective of the client, lawyer and accountant, in respect of the ability to claim solicitor-privilege, of clearly examining, establishing and documenting the roles of the lawyer and accountant in any matter where the two professionals are involved and paying particular attention to the purpose and focus of verbal and written communications and, in the case of written communications, to whom such communications are sent (and who may be copied on such communications). Such caution, documentation and evidence may be important in the context of an audit or tax dispute, where a client asserts (which assertion is challenged by the Minister) that certain documentation or communications are subject to solicitor-client privilege.

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[3] "Common interest privilege" refers to the circumstance in which one party to a commercial transaction provides privileged documents to another party to the transaction, such as when the party provides the documents to further the common interest of having the transaction concluded and the parties do not intend to waive privilege attached to the documents. Common interest may not apply if the parties are adverse in interest.


[5] Ibid. at paragraph 11.

[6] Imperial Tobacco Canada Ltd. v. R., 2013 CarswellNat 1017 (T.C.C.) at paragraph 73.


[9] If paragraph 95(6)(b) of the Act applied, the shares which Imperial Tobacco subscribed for in BATA and BATI would have been deemed not to have been issued.

[10] 1984 CarswellOnt 785 (Supreme Court of Ontario (Toronto Motions Court)).

[11] Subsection 232(4) provides for the procedure to be followed for adjudication by a court on the question of solicitor-client privilege with respect to documents which have been seized (pursuant to section 231.3 of the Act), provided to the CRA (pursuant to a request for documentation under section 231.1 of the Act), or which are subject to a Demand or Requirement for Information (issued pursuant to section 231.2 of the Act).


[14] A client may waive solicitor-client privilege expressly, or by implication (i.e., "implied waiver").