



TAX EXECUTIVES INSTITUTE, INC.

Toronto Chapter | The preeminent Association of Tax Professionals Worldwide

The Newsletter –Volume 4, Issue 4

June 2015

Upcoming Events:

Litigation Day

September 17, 2015

CRA Day

October 22, 2015

International Day

November 18, 2015

Inside this issue:

Practitioners Corner:

Lawyers, Accountants and Privilege

By: L. David Fox,
Partner, Cummings
Cooper Schusheim
Berliner LLP

2

AGM Highlights:

6

New Members

6

Recent Event Highlights

7

About TEI

8

PRESIDENT'S CORNER

A Message From Paul Revell, President

Another Successful Year!



I am very proud to have been able to serve as President of the largest chapter of Tax Executives Institute Inc., the Toronto Chapter. I wish to thank all of the members of the Board for their incredible hard work and dedication by not only fulfilling their Board duties but also by providing a very robust program of informative events, keeping communications open through the newsletter and the web page, and providing insightful guidance for the betterment of the organization. As a team, we have accomplished much together in this past year and it has passed very quickly for me.

I also wish to thank our past presidents for their assistance and guidance. It was a pleasure working with Lori Burrows, our Chapter Representative, now about to start the second year of her two year term. The Nominating Committee, made up of past presidents Winston Woo (Chair), Mary Dibattista and George Koltowski provided an outstanding service for the Toronto Chapter by

interviewing the candidates for the Toronto Board of 2015/2016. I am positive the new Board will continue to serve the members well into the future.

Many people took the time to respond to our recent in-depth chapter survey. The feed back we received was excellent and I am confident the new Board will be implementing some of your program choices, location preferences, and other suggestions to ensure that the TEI Toronto Chapter continues to offer the best value in terms of cost and education.

Thank you to all Board members, officers, members, sponsors, and friends of the chapter. Thank you for the opportunity to allow me to serve an organization that continues to grow and prosper through participation.

Paul Revell, President

LONG TERM MEMBER AWARD RECIPIENTS

The following members were recognized publicly at the TEI Toronto Chapter AGM for their long term membership to the organization. Congratulations!

Catherine Brennan
Lori Burrows
Roy Dulmage
David Harris

Gregory Hogan
Ricardo Horton
Karen Kolankowski
Anne McGrath

Gail Robinson-Gow
Michael Welch
Robert Westlake
Jim Williams

PRACTITIONER'S CORNER

Lawyers, Accountants and Privilege

By: L. David Fox, Partner, Cummings Cooper Schusheim Berliner LLP

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

Lawyers, Accountants and Privilege

By: L. David Fox, Partner, Cummings Cooper Schusheim Berliner LLP

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 specifically addressed litigation privilege and the circumstances in which such privilege may be claimed. However, in a broader context, the decision raises the issue of when privilege (including solicitor-client privilege and common interest privilege) 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*³ (“*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

(a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the

privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and

(b) that, 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.⁴

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.⁵

If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.⁶

An 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.*⁷ (“*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 Italy 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(6)(b) of the Act applied to the relevant transaction.⁸

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*

Lawyers, Accountants and Privilege

By: L. David Fox, Partner, Cummings Cooper Schusheim Berliner LLP

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)*⁹ (“*Mutual Life Assurance*”) involved an application by Mutual Life Assurance Co. of Canada (“*Mutual Life*”) under section 232 of the Act 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 Shipp 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.¹⁰

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

Lawyers, Accountants and Privilege

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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.¹¹

Such privilege between a lawyer and a client is permanent and can only be waived by the client.¹²

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.

David Fox is a Partner in the Corporate and Personal Income Tax Planning Group at Cummings Cooper Schusheim Berliner LLP. David advises private companies and high net worth individuals in respect of income tax and succession planning matters. David also advises on tax dispute

resolution and litigation matters. Finally, David has extensive experience advising non-resident clients on tax structuring for entry into the Canadian market place, cross-border employment, assignments and secondments of non-resident employees to Canada.

Footnotes:

1. 2015 T.C.C. 78 (T.C.C.), Docket: 2012-517(IT)G.
2. 2005 CanLII 18295 (ON S.C.J.).
3. 1969 CarswellNat 296 (Exch. Ct.).
4. *Ibid.* at paragraph 11.
5. *Imperial Tobacco Canada Ltd. v. R.*, 2013 CarswellNat 1017 (T.C.C.) at paragraph 73.
6. *General Accident Assurance Co. v. Chrusz*, (1999), 45 O.R. (3d) 321, [1999] O.J. No. 3291 (ON C.A.) at paragraph 120.
7. *supra* note 6.
8. 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.
9. 1984 CarswellOnt 785 (Supreme Court of Ontario (Toronto Motions Court)).
10. *supra* note 9 at paragraph 12.
11. *supra* note 3 at paragraph 7.
12. A client may waive solicitor-client privilege expressly, or by implication (i.e., "implied waiver").

ACKNOWLEDGEMENTS

TEI gratefully acknowledges the following sponsors of TEI's 16th annual tax community golf tournament

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TEI AGM—MAY 2015

The Annual General Meeting of the Tax Executives Institute Inc. Toronto Chapter was held on May 21, 2015 at the Toronto Board of Trade. The audience of approximately sixty attendees accepted the Minutes and the Board reports. The meeting was followed by an engaging presentation from Marc Belaiche, President of Toronto-Jobs.ca. Marc has been in the recruitment industry since 1995 and shared with our members best networking practices in a social media world. Marc provided helpful tips for setting up and

managing a professional's profile on LinkedIn and provided other social media advice. The Chapter President, Paul Revell, presented this year's TEI scholarship awards to Avin Persad-Ford, scholarship award recipient from Ryerson University and Xuan Chen and Benjamin Ahier, scholarship award recipients from the University of Waterloo. 1st VP, Ernest Greenfield acknowledged TEI's long term member award recipients and congratulated them with certificates for their generous support to the organization.



Long term member award recipients who were in attendance at the AGM
Left to right: Anne McGrath, Karen Kolankowski, Ricardo Horton, Lori Burrows, David Harris. Back Row: Paul R., President and Ernest G. 1st VP.

Here are a few tips provided by Marc Belaiche to help you network your way to the top:

Always Be Networking

Most people only choose to start networking when they're looking for a new position. If you network continuously, when you begin to look for a change in employment it won't be something you need to switch on and off. Your network may pay off even when you're not expecting it.

Do What You Say You Will

By not contacting people if/when you say you will, you are sending a message that you're not that reliable. Following up is so easy to do, requires a few minutes of your time and sends a very positive message about you.

Make Yourself Available

Go to Chapter meetings, volunteer or join networking groups. There is never a shortage of places where you can meet people – ask around and you will be amazed at places where people are. Make the time to go to these events, but don't expect a lot the first time you meet someone. Like sales, most of the benefit of networking doesn't come in a first contact.

NEW MEMBERS

TEI Toronto Chapter extends a warm welcome to the following new members!

Anastasia Hajjvasilis, Hydro One Networks, Inc.
Grant Smith, Minto

Jenny Xie, The Stronach Consulting Corp.

RECENT EVENT HIGHLIGHTS

TEI Hot Tax Topics— March 2014

The Toronto Chapter hosted TEI's Hot Tax Topics on March 12, 2015 at the Arcadian Court in Toronto. TEI welcomed Patrick Marley, Partner, Taxation, Osler who provided us with international tax updates regarding the OECD/ G20 BEPS Project including updates on each of the BEPS action plans with a focus on some of the more practical considerations and applic-

ation to Canada of the various BEPS initiatives. Patrick also touched on Canada's new anti-treaty shopping back to back loan rules. The latter part of the session included an excellent panel discussion where Patrick was joined by colleagues Richard Tremblay, Partner Taxation and Amanda Heale, Partner Taxation from Osler on engaging conversations with our members on

some of the key current hot tax topics. These included latest trends in Canadian transfer pricing audit practices, transfer pricing risk and re-characterization as well as the anticipated impact of country by country reporting. We encourage you to visit our TEI Toronto Chapter website to view the Osler's presentation if you were unable to attend the event.

Professional Development Day — April 2015

The TEI Toronto Chapter and KPMG co-hosted Professional Development Day 2015 which was held at the Metro Toronto Convention Centre. Over 300 tax professionals attended a full day of professional development including plenary sessions and many workshops on a broad range of tax matters. Some of the key

discussions included tax loss planning, international corporate updates, emerging issues and opportunities in SR&ED, US corporate tax updates, a refresher on reorganizations, data analysts and tax technology buttons and tax and immigration issues in respect of business travellers. The engaging and insightful day of tax discussion

concluded with a transfer pricing session review followed by an excellent reception that provided an opportunity for networking among TEI members, KPMG colleagues and friends. We would like to greatly thank Rosemary, Michelle, Trixie and the rest of the KPMG team for their great efforts in putting together this successful event.

TEI Golf Day — May 2015

On Thursday May 28th, the annual TEI Toronto Chapter Golf Day was held at the Copper Creek Golf Club in Kleinburg. Organizing Event Chairs Frank Martinicchio, Ernest Greenfield and Paul Revell greeted TEI members, professional friends, colleagues and advisors to a great day of golf and networking while

under the umbrella of some fantastic sunny weather!

The winning team included Richard Edwards, Keith Abriel, Dean Landry, and Ernie Hudson, all of who took home top marks of the day. As always, the tournament would not be a success without the generous contributions of all of our

many sponsors and the support of our faithful volunteers Phil Riley, Lori Burrows and Ricardo Horton. We would also like to thank the Copper Creek staff for their excellent hospitality providing us with exceptional service throughout the day.

**2014/2015
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ABOUT TEI AND THE TORONTO CHAPTER

TEI is the preeminent association of business tax executives. The Institute's 7,000 professionals manage the tax affairs of more than 3,000 of the leading companies in Canada, the United States, Europe and Asia and must contend daily with the planning and compliance aspects of Canada's business tax laws. Canadians constitute approximately 15 percent of TEI's membership, with our Canadian members belonging to chapters in Calgary, Montreal, Toronto and Vancouver, which together make up one of our eight geographic regions. Many of our non-Canadian members (including those in Europe and Asia) work for companies with substantial activities and investment in Canada.

TEI's membership includes representatives from major industries including manufacturing; distributing; wholesaling and retailing; real estate; transportation; financial services; telecommunications, technology and natural resources (including timber and integrated oil companies).

Membership in TEI is individual-based and is available to corporate employees whose work consists principally of administering taxes on an executive or management level. Individuals engaged in public tax practice are not eligible.

Applicants for membership must have a minimum of five years corporate tax

experience (or its equivalent). For additional information on membership eligibility and benefits, or to apply for membership, please visit our TEI website at www.tei.org and our Toronto Chapter web page at:

<http://www.tei.org/chapters/toronto/Pages/default.aspx>

Mission

The mission of the Tax Executives Institute is to enhance and improve the tax system and to serve its members, their employers, and society generally by facilitating interaction among, and the training of, members and their staff, by effectively advocating its members' views, and by promoting competence and professionalism in both the private and government sectors.

Principle

The Tax Executives Institute is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity.

We are on the Web!
Visit us at

WWW.TEI.ORG



This chapter newsletter is a quarterly publication. We welcome your contributions and comments. Please contact the editors if you would like to submit an article or to provide feedback:

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This newsletter is for general discussion purposes and should not be relied upon for tax advice.