No. A-465-16

FEDERAL COURT OF APPEAL

BETWEEN:

IGGILLIS HOLDINGS INC. and IAN GILLIS

APPELLANTS

AND:

THE MINISTER OF NATIONAL REVENUE

RESPONDENT

AND:

ABACUS CORPORATIONS MERGERS AND ACQUISITIONS,
THE FEDERATION OF LAW SOCIETIES OF CANADA, and
THE CANADIAN BAR ASSOCIATION

INTERVENERS

MEMORANDUM OF FACT AND LAW OF THE INTERVENER THE FEDERATION OF LAW SOCIETIES OF CANADA

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OVERVIEW

1. This appeal asks whether a party (here, Abacus) who discloses a solicitor-client privileged communication to a transactional counterparty (IGGillis) thereby waives or loses the privilege in its entirety.

2. The application judge's analytical starting point was that disclosing a solicitor-client privileged communication to even one person results in a total loss of the privilege. He then focused on what he called advisory common interest privilege as one exception to this total-loss concept. But the total-loss concept is no longer the correct analytical starting point.

3. The total-loss concept has become obsolete: the idea that disclosing solicitor-client privileged information to even one person causes a loss of the privilege vis-à-vis everyone is irreconcilable with the modern version of the privilege, and particularly the requirement that solicitor-client privilege must remain as close to absolute as possible. The doctrine of limited waiver—allowing privilege to be waived for some parties but not others—has replaced the total-loss concept. Advisory common interest privilege is but one of many forms of limited waiver.

4. A review of the case law indicates that the total-loss concept has been applied only a handful of times in the 15 years since solicitor-client privilege was first recognized by the Supreme Court of Canada as constitutional in character and deserving of near-absolute protection. As a result, eliminating advisory common interest privilege, as the application judge did here, creates one of the only situations where limited waiver does *not* apply and the total-loss concept *does*. This Court should not countenance that anomalous result.

PART I – STATEMENT OF FACTS

5. The Federation takes no position on the facts.

PART II – POINTS IN ISSUE

6. The Federation's submissions are limited to the question of whether, when considering the effect of Abacus' disclosure of solicitor-client privileged communications to IGGillis, the correct analytical starting point is the total-loss concept or, instead, limited waiver.

PART III – SUBMISSIONS

7. Both the application judge and the Minister of National Revenue implicitly rely on the theory that, because Abacus waived solicitor-client privilege to IGGillis, it thereby also waived privilege to everyone, including the Minister. Thus, the application judge and the Minister start with the total-loss concept.[1]

8. But the total-loss concept is anachronistic and irreconcilable with the modern requirement that solicitor-client privilege must remain as close to absolute as possible. In light of this requirement, limited waiver has become the rule, not the exception. Advisory common interest privilege is but one well-established example of limited waiver.

A. The total-loss concept is anachronistic

9. Before about the 1970s or early 1980s, solicitor-client privilege was a rule of evidence that limited the *compellability* of privileged communications, but only from the lawyer, the client, or an agent of either. There was no restriction on the *admissibility* of communications covered by solicitor-client privilege, even if they had been misplaced

[1] See, in particular, *IGGillis Holdings Inc. v. Canada (National Revenue)*, 2016 FC 1352, at paras. 137-156 [Reasons] [Federation Authorities Tab 8].

by—or even stolen from—the privilege holder.[2] Thus, once someone outside the select group of non-compellable witnesses could speak to the communications, the practical benefit of the privilege was lost.[3]

10. A logical extension of this initial version of solicitor-client privilege was the total-loss concept—*i.e.*, the idea that waiving solicitor-client privilege to even a single person constitutes a general waiver. This is because disclosure to even a single person meant the otherwise confidential and privileged communications not only were admissible, but also had become compellable.[4] After disclosure, to speak of the privilege was pointless.

11. That initial version of solicitor-client privilege—the foundation of the total-loss concept—no longer exists.

12. By the early 1980s, solicitor-client privilege transformed from a mere evidentiary rule to a substantive right that could be raised whenever communications subject to solicitor-client privilege were likely to be disclosed.[5]

13. After the transformation, such communications were admissible only if "what [was] being sought to be proved by the communications [was] important to the outcome of the case and … there [was] no reasonable alternative form of evidence that could be used for that purpose".[6]

14. Thus, the total-loss concept did not survive solicitor-client privilege's transformation into a substantive right: the substantive right restricted the ability of a party who might previously have benefited from the total-loss concept to tender privileged communications in evidence.

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[2] *Calcraft v. Guest*, [1898] 1 Q.B. 759 [Federation Authorities Tab 3].
[3] *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 876 [*Descôteaux*] [Joint Authorities Tab 22].
[4] Adam M. Dodek, *Solicitor-Client Privilege*, (Markham, ON: LexisNexis, 2014) at 213 and 221 [Dodek] [Federation Authorities Tab 20].
[5] *R. v. McClur*e, 2001 SCC 14 at paras. 18-25 [*McClure*] [Federation Authorities Tab 15]; *Solosky v. The Queen*, [1980] 1 S.C.R. 821 [Federation Authorities Tab 18].
[6] *Descôteaux* at 876 [Joint Authorities Tab 22].

15. Solicitor-client privilege underwent an even greater transformation in the early 2000s, when the Supreme Court of Canada first recognized its constitutional nature.[7] The court described solicitor-client privilege as "a principle of fundamental justice and civil right of supreme importance in Canadian law" that "must remain as close to absolute as possible if it is to retain relevance".[8]

16. The requirement that solicitor-client privilege must remain as close to absolute as possible has since dominated Supreme Court jurisprudence on solicitor-client privilege, including cases about the provisions of the *Income Tax Act* at issue here.[9]

17. While the total-loss concept was justified under the initial, pre-1980s version of solicitor-client privilege, it is incompatible with the modern version. Over a quarter century, solicitor-client privilege converted from a rather technical evidentiary rule to a bedrock constitutional principle essential to the proper administration of justice. The law of waiver had to respond to that conversion.

18. The response has been and should be the doctrine of limited waiver—a client's ability to waive privilege to only certain parties. Limited waiver serves the modern requirement that solicitor-client privilege must remain as close to absolute as possible.[10] And, as set out below, limited waiver already is the rule, not the exception. Advisory common interest privilege is merely one example of limited waiver.

19. Limited waiver keeps solicitor-client privilege closer to absolute than the total-loss concept. Thus, to apply the concept would be justified only if it were necessary for *everyone* to benefit from a waiver of privilege to *someone*. But that is both unnecessary and undesirable: removing privilege because, for example, a client confides in her sister

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[7] *McClur*e at para. 41 [Federation Authorities Tab 15].
[8] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, 2002 SCC 61 at para. 36 [*Lavallee*] [Joint Authorities Tab 48].
[9] See, *e.g.*, *Canada (National Revenue) v. Thompson*, 2016 SCC 21 [Joint Authorities Tab 16].
[10] Dodek at 225-226 [Federation Authorities Tab 20].

about the legal advice she has received concerning her divorce serves no useful purpose. And a rule that so easily triggers the privilege's removal can only have the effect of diminishing clients' willingness to communicate candidly and completely under cloak of the privilege.

20. Any justification for the total-loss concept was lost in the transformation of solicitor-client privilege outlined above. Furthermore, no harm results from allowing a privilege-holder to waive privilege to certain persons, but not the rest of the world.

21. Limited waiver is consistent with the rules governing waiver generally. Waiver occurs in two situations: (i) where a client makes an informed decision to waive privilege or (ii) where the principles of fairness and consistency so require (*e.g.*, where a party pleads reliance on legal advice).[11]

22. Neither situation requires a party who discloses a privileged communication to one person to waive privilege to the world. A party who discloses a privileged communication to one person does not intend to waive privilege for everyone. Similarly, the principles of fairness and consistency do not require a total loss of privilege because of any disclosure to any party. There is nothing unfair or unjust in allowing a privilege-holder to waive privilege only to some parties even though it might be unfair and unjust for a privilege-holder to waive privilege over only part of a communication or to plead reliance on a privileged communication without disclosing it. Selective waiver by content may be unfair and unjust, limited waiver by party is not.

23. Despite all this, the application judge favoured a "restrictive interpretation" of solicitor-client privilege—which led him in turn to apply the total-loss concept and to jettison advisory common interest privilege—on two bases. First, he held that the requirement that solicitor-client privilege must remain as close to absolute as possible applies only where legislation purports to limit the privilege. Second, he held that

[11] *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para. 6 [Joint Authorities Tab 71].

solicitor-client privilege's benefits are speculative and its costs are significant.[12] Neither holding is tenable.

24. First, solicitor-client privilege must remain as close to absolute as possible to promote candid and complete discussions between lawyers and their clients.[13] That purpose is undermined if the privilege is easily lost in any manner—not merely as a result of legislative intrusion. For example, if the total-loss concept still applied, a client would obliterate solicitor-client privilege by voluntarily disclosing privileged communications to a spouse, a sibling, a parent, a friend, a non-legal professional advisor, or a transactional counterparty. That result undermines the goal of candid and complete solicitor-client communications even though no legislation is involved. The requirement that solicitor-client privilege must be kept as close to absolute as possible must be more than just a rule of statutory construction if it is to achieve its purpose.

25. Second, the Supreme Court of Canada has stated time and again that solicitor-client privilege is essential to the legal system's proper functioning, a constitutional principle of fundamental importance, "a cornerstone of access to justice",[14] and "a positive feature of law enforcement, not an impediment to it".[15] The application judge ignored those statements, apparently on the basis of academic commentary, primarily

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[12] Reasons at paras. 157-163 [Federation Authorities Tab 8].
[13] *Lavallee* at para. 36 [Joint Authorities Tab 48].
[14] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras. 26 and 34 [Joint Authorities Tab 4].
[15] See, *e.g.*, *Smith v. Jones*, [1999] 1 S.C.R. 455 [Federation Authorities Tab 17]; *Lavallee* at para. 36 [Joint Authorities Tab 48]; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18 at para. 34 [Federation Authorities Tab 7]; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 14 [Joint Authorities Tab 62]; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 26 [Joint Authorities Tab 13]; *R. v. Cunningham*, 2010 SCC 10 at para. 26 [*Cunningham*] [Federation Authorities Tab 14]; and *Canada (Attorney General) v. Chambre des notaires du Québec*, 2016 SCC 20 at para. 28 [Federation Authorities Tab 4].

from the United States.[16] It was not open to him to do so. The benefits of solicitor-client privilege are a matter of *stare decisis*, not speculation.

B. The total-loss concept is already defunct

26. Recognizing the total-loss concept's obsolescence is merely to rationalize the existing law. The decision below is one of only a handful of cases decided post-*Lavallee*—*i.e.*, since 2002—in which a Canadian court has given any effect to the concept.[17]

27. Instead, since about the 1980s, courts have created a host of exceptions to the total-loss concept—in large part to avoid its undesirable results. Some of those exceptions are outlined below and demonstrate that, in practice, limited waiver already is the rule, not the exception:

(a) Inadvertent disclosure of privileged material to a person is no longer waiver to that person, let alone to the world. For example, privileged documents mistakenly included in a government's response to a freedom of information request remain privileged.[18]

[16] Reasons at para. 162 [Federation Authorities Tab 8].
[17] Most of the cases that have applied the total-loss concept since *Lavallee* have done so because a party has waived solicitor-client privilege in a separate but related proceeding and it would be "manifestly unjust for the defendants in one action to have access to all documents relating to the relationship as between the parties but not be entitled to rely on those same documents in a substantially related proceeding" (*National Bank Financial v. Potter*, 2007 NSSC 22 at para. 9 [Federation Authorities Tab 11]). However, other cases decided since *Lavallee* have not followed this rule, and have favoured limited waiver instead: *Sendagire v. Co-operators General Insurance Co.*, 2009 SKQB 265 at paras. 22-25 [Federation Authorities Tab 16].
[18] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 56 [Federation Authorities Tab 2].

(b) Theft of a privileged document no longer results in waiver to the thief or to the world. In *Eizenshtein v. Eizenshtein,*[19] an individual obtained emails between a husband and his lawyer discussing the husband's divorce. The individual provided the emails to the wife. The husband contended privilege remained intact because the emails were stolen. The court found that the emails remained privileged no matter how the individual obtained them. The husband did not intend for them to go beyond the individual with access to them—thus privilege remained generally intact even though the husband might have intended to waive privilege to a particular person.[20]

(c) Parties may rely on the doctrine of limited waiver when they comply with a statutory requirement. For example, both the Federal Court[21] and the Ontario Divisional Court have accepted that a company that provides privileged communications to its auditors does not waive privilege to the world. In doing so, the Ontario court explicitly considered whether the waiver to the auditor—a stranger to the solicitor-client relationship—resulted in a total loss of privilege, but held that applying the total-loss concept was unnecessary and would be incompatible with the rule that solicitor-client privilege must be as close to absolute as possible.[22]

(d) In *R. v. Basi,*[23] the court held that the government could waive privilege by disclosing certain documents to defence counsel in a criminal proceeding without waiving privilege to the world because the government did not intend to waive privilege generally.

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[19] *Eizenshtein v. Eizenshtein,* 2008 CanLII 31808 (ONSC) [*Eizenshtein*] [Federation Authorities Tab 6].
[20] *Eizenshtein* at paras. 36-40 [Federation Authorities Tab 6].
[21] *Interprovincial Pipe Line Inc. v. Minister of National Revenue,* [1996] 1 F.C. 367 (T.D.) [Joint Authorities Tab 43].
[22] *Philip Services Corp. v. Ontario Securities Commission,* 2005 CanLII 30328 (ONSCDC) at para. 57 [*Philip Services Corp.*] [Federation Authorities Tab 12].
[23] *R. v. Basi,* 2008 BCSC 1242 [Federation Authorities Tab 13].

(e) Disclosing a privileged document to the police to assist in a criminal investigation[24] or to the director under what is now the *Competition Act*[25] does not thereby waive privilege to anyone else.

(f) In *Tyler v. Truscott*,[26] the government provided the parties and the court with a privileged report concerning a miscarriage of justice. The court held that the total-loss concept did not apply because the government intended to limit the disclosure of the report to specific parties for a specific purpose.

(g) In *Kemp v. Wittenberg*,[27] the plaintiff in a personal injury action disclosed the advice she had received from her lawyers to her medical practitioners, but with the expectation that the advice would be held in confidence and not disclosed to anyone else. On that basis, the court held that the total-loss concept did not apply.

(h) Tendering privileged documents to substantiate a claim in a bankruptcy proceeding does not result in a total loss of privilege.[28]

(i) Parties with a common interest in litigation—or, before the decision below, in a commercial transaction—can waive privilege among themselves without waiving it to all persons. The Memorandum of Fact and Law filed by IGGillis and Abacus is also replete with examples of courts applying common interest privilege in the transactional context.

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[24] *British Coal Corp. v. Dennis Rye Ltd. (No. 2)*, [1988] 3 All E.R. 816 (C.A.) [Federation Authorities Tab 1].
[25] *Caterpillar Tractor Co. v. Ed Miller Sales & Rentals Ltd.*, 1988 ABCA 282 at paras. 23-24 [Federation Authorities Tab 5].
[26] *Tyler v. Truscott*, 2005 CarswellOnt 3301, [2005] O.J. No. 2667 (C.A.) [Federation Authorities Tab 19].
[27] *Kemp v. Wittenberg*, 1997 CanLII 2468 (BCSC) [*Kemp*] [Federation Authorities Tab 10].
[28] *Kansa General International Insurance Company Ltd. (Winding up of)*, 2011 QCCA 1558 at para. 33 [Federation Authorities Tab 9].

(j) Parties to a joint retainer agreement automatically waive privilege with respect to each other, but not the world (referred to by the application judge as "joint client privilege" or "JCP").[29]

28. If the total-loss concept still had validity, the courts would have applied it in these cases and others like them. Instead, through the doctrine of limited waiver, the courts sought to avoid the undesirable results that the total-loss concept would have produced.

29. Contrary to the application judge's view, there is no "unrequited unfairness" in allowing a litigant to withhold privileged information from a litigation adversary even though that information has been shared with a stranger to the litigation.[30] This is so whether that someone is a transactional counterparty, a romantic partner (*Eizenshtein*), an auditor (*Philip Services Corp.*), or a medical professional (*Kemp*). The prejudice to the litigation adversary is no greater than in the absence of the unrelated sharing.

30. The application judge also stated that advisory common interest privilege "eviscerates [solicitor-client privilege] of any meaning" by allowing privileged communications to be shared outside the solicitor-client relationship.[31] But if this were right, then solicitor-client privilege would have perished years ago from the gaping wounds the total-loss concept suffered from the exceptions outlined above. Advisory common interest privilege is not a unique exception that will doom solicitor-client privilege; it is but one example of the doctrine of limited waiver that overtook the total-loss concept years ago. This Court should recognize that reality.

31. It would not be the first court to do so. In *Pinder v. Sproule*,[32] Slatter J. (as he then was) identified many of the same exceptions to the total-loss concept that are set out above. He proposed a three-factor test for determining whether intentional disclosure to

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[29] The Federation understands that the Canadian Bar Association will develop this example.
[30] Reasons at para. 153 [Federation Authorities Tab 8].
[31] Reasons at para. 150 [Federation Authorities Tab 8].
[32] *Pinder v. Sproule*, 2003 ABQB 33 [*Pinder*] [Joint Authorities Tab 60].

one person resulted in disclosure to the world.[33] The test resembles the test for implied waiver (*e.g.*, as a result of having pleaded legal advice) and can be recast as follows: do the principles of fairness and justice require waiver to all persons as the result of waiver to a select group of persons? As demonstrated by the cases above, the answer is usually no.

32. To decide this appeal, however, this Court need not articulate a comprehensive test to replace the total-loss concept. Here, it is enough to recognize that advisory common interest privilege is merely one example of the limited waiver doctrine, and that the doctrine has overtaken the total-loss concept. In that regard, advisory common interest privilege is unremarkable and not, as the application judge found, incompatible with solicitor-client privilege.

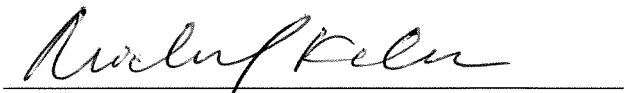
PART IV – ORDERS SOUGHT

33. The Federation:

(a) takes no position on the disposition of this appeal; and

(b) does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of September, 2017.



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[33] *Pinder* at para. 70 [Joint Authorities Tab 60].

PART V – LIST OF AUTHORITIES

Cases

Other Authorities