Federal Court  Cour fédérale

Date: 20161207

Docket: T-126-15

Citation: 2016 FC 1352

Ottawa, Ontario, December 7, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

IGGILLIS HOLDINGS INC. AND IAN GILLIS

Respondents

and

ABACUS CAPITAL CORPORATIONS MERGERS AND ACQUISITION

Intervener

JUDGMENT AND REASONS

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I. Overview

[1] This application concerns whether the Respondents are entitled to claim a Common Interest Privilege [CIP] to protect solicitor-client privileged communications disclosed during the negotiation of a commercial transaction for the sale of the shares of corporations of the Respondents to the Intervener. The communications are alleged to pertain to a common legal interest of the contracting parties to enable the completion of the sale.

[2] Given the somewhat unorthodox evolution of the disposition of this matter, the Court provides a brief description of the process followed to reach its conclusions. This also serves as a roadmap of the decision.

[3] The Applicant served an identical Requirement for Information [the Requirements] on the Respondents to produce a document [the Abacus Memo or the Memo] pursuant to subsection 231.2(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), as amended [the ITA or the Act].

[4] The two Respondents refused to produce the Memo. The Applicant now brings this summary application under subsection 231.7(1) of the Act to enforce the Requirements. Abacus Capital Corporations Mergers and Acquisitions [Abacus or the Intervenor] has intervened in this matter, filing evidence and advancing arguments in support of its claim of solicitor-client privilege [SCP] over the Abacus Memo.

[5] The Abacus Memo is authored by Joel Nitikman [Mr. Nitikman], legal Counsel for the Intervener, Abacus, and was disclosed to Richard Kirby [Mr. Kirby], legal Counsel for the two Respondents, in the course of a purchase by Abacus and sale by the two Respondents of certain assets and shares [the shares]. Mr. Kirby also participated in the formulation of the contents of the Memo in exchanges with Mr. Nitikman prior to it being drafted.

[6] Abacus is composed of a large group of corporations, partnerships and trusts. It assists in tax planning efforts, in particular by providing advice on corporate transaction structures. The benefits of this advice, in the form of reduced payable taxes, are shared with the persons or entities using its services. In this case, there were 17 sub-transactions [the transactions] entered into (including pre-sale and post-sale transactions and the sale itself) for the purpose of finalizing what is described collectively as the "Transaction", whereby an Abacus entity acquired the shares of the Respondents' corporations.

[7] No formal letter of intent was entered into between the Respondents and Abacus. However, the transactions and their effect in terms of the Act's application to them were described in the Memo over which the Respondents now claim as protected by SCP.

[8] More specifically, the Respondents claim that the Memo is subject to CIP. This is a legal doctrine that is an adjunct to standard SCP, whereby the disclosure of privileged communications made to parties sharing a common legal interest does not result in waiver of the privilege so as to terminate its protection from disclosure in truth-serving legal processes.

[9] There remains some confusion concerning the application of CIP. There is no controversy regarding the privileged nature of communications involving a common interest in situations where two or more clients are represented by the same lawyer. This is commonly described as joint client privilege [JCP]. However, there is some controversy with regard to the doctrine of SCP where different clients are represented by different lawyers [allied lawyers] who share privileged information on a matter of common legal interest not related to actual or anticipated litigation. These most often pertain to commercial transactions, such as in this matter. For the purposes of this case, and in most recent cases on this subject, CIP refers specifically to the allied lawyer situation, as distinct from the sharing of legal communications in a JCP context.

[10] The Respondents rely on copious American and Canadian case law, indeed on jurisprudence from around the common law world, to demonstrate that CIP is an accepted doctrine to be applied in all areas of SCP, including commercial transactions. There remains, however, considerable controversy over the scope of CIP, as thirteen American States have restricted it to litigation-related matters including situations of anticipated litigation. In particular, the Court will be referring to the very recent decision of June 9, 2016 by the New York Court of Appeals in the matter of *Ambac Assurance Corp v Countrywide Home Loans Inc*, 27 NY (3d) 616 (CA 2016) [*Ambac*] that makes this distinction and refused to apply CIP outside of litigation-related circumstances. For the purpose of analyzing this distinction, non-litigation CIP is referred to most often in this decision as "(legal) advisory CIP" to distinguish it from "litigation CIP". Advisory CIP is also often referred to in the case law as "transactional CIP", because most of the jurisprudence on the subject concerns commercial transactions.

[11] It is not the Applicant's submission that advisory CIP should be distinguished from litigation CIP. Advisory CIP has broad acceptance across Canada, although only considered once in this Court in *Pitney Bowes of Canada Ltd v R*, 2003 FCT 214 [*Pitney Bowes*]. The decision upheld the doctrine, but in what the Court determines were JCP circumstances. Neither CIP, nor any distinction in its application has been considered by the Federal Court of Appeal, the Supreme Court of Canada, or the Supreme Court of the United States.

[12] The Applicant argues that the Memo is not privileged because it is primarily a "business document" wherein the legal advice is incidental to the true nature of the transaction. The Applicant also claims that the Memo is not subject to CIP and, therefore, that Abacus lost or waived its privilege over the Memo when Mr. Nitikman circulated the Memo to Mr. Kirby. The Court rejects the Applicant's submissions.

[13] Nevertheless, the consequences of CIP in this case caused the Court concerns in terms of fairness due to its impact if applied in a legal process challenging the Transaction. The Court also had difficulties understanding the justification for the doctrine of CIP as articulated in the Canadian jurisprudence cited in *Pitney Bowes*. The Court was not originally aware of the unsettled state of the law in the United States with respect to the limited application of CIP to litigation related matters, as this was not an issue raised by the Applicant.

[14] The Court's first concern was the effect of CIP on the Court's ability at trial to ultimately decide the substantive matter if the Memo was found to be privileged. In this case, the only evidence before the Court describing how the Transaction was concluded would have been the resulting transactions themselves, as described in public documents. This was acknowledged by Counsel for

the Respondents. This means that lawyer-to-lawyer legal communications and related information pertaining to how the agreement was negotiated would no longer be available to the courts. This struck the Court as a result that would not only deny the courts an extensive quantity of information on how transactions were formed, but also highly relevant substantive information that in many respects could determine the outcome of the litigation.

[15] The Court's second difficulty arose from the *Pitney Bowes* decision. The Respondents argue that it is binding on this Court based on the principles of "horizontal" *stare decisis* and judicial comity applying to decisions of the same court. As it turns out, I do not follow *Pitney Bowes* as it is distinguishable on the facts as a decision of joint representation. There are also "compelling reasons" that I provide not to apply it (*R v Henry*, [2005] 3 SCR 609 at para 44 (SCC); *Pfizer Canada Inc v Apotex Inc*, 2014 FCA 250 at para 115). One of these was my initial concern about the Court's conclusion that "economic and social values inherent in fostering commercial transactions […] favoured the recognition of such a privilege" (*Pitney Bowes* at para 17).

[16] The Court did not understand how SCP, which has long been recognized as a class form of privilege not requiring substantiation, was being rationalized in a specific area of legal practice relating to commercial transactions, and moreover, that this was being done on the basis of "economic and social values". This appeared to be an application of the case-by-case evaluation required for the establishment of a new form of privilege. Upon further examination, the Court concludes that SCP issues are, in any event, limited to factors relating to the administration of justice, meaning that economic and social values are irrelevant to the discussion.

[17] In terms of advancing the "economic and social values" of society, I also could not apply this reasoning to the seventeen *pro forma* transactions in this case, which were undertaken for the sole purpose of tax avoidance on a commercial transaction. Tax avoidance is permitted in view of the strict application of principles of interpretation and the rule of law, but it is not conduct that should be encouraged and assisted by new privilege doctrines meant to keep relevant evidence challenging the legality of these schemes out of the courts.

[18] Third, the Court also recognized a discrepancy between CIP and what could be described as the founding "Wigmorean principles" of SCP raised in two American cases presented by the Applicant. Among the passages from Wigmore that caught the Court's eye, was the following citation reproduced in *Duplan Corp v Deering Milliken Inc*, 397 F Supp 1146 (DSC 1974) at 1175 [*Duplan*]:

> The privilege is designed to secure objective freedom of mind for the *client* in seeking legal advice (ante, sec. 2291). It has no concern with other persons' freedom of mind, nor with the attorney's own desire for secrecy in his conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particular *third person* for the benefit of the client.
>
> [emphasis added]

[19] The Court further understood that there was originally some controversy over whether CIP could apply beyond JCP circumstances. This raised the issue as to how Wigmorean principles on SCP were circumvented. In *Bank Brussels Lambert v Credit Lyonnais (Suisse)*, 160 FRD 437 (SD NY 1995) [*Bank Brussels Lambert*], there were references to several cases, one

being *North River Insurance Co v Philadelphia Reinsurance Corp*, 797 F Supp 363 (D NJ 1992). The Court in that matter could not rationalize the inconsistency between the doctrine of CIP and SCP principles stating at page 367 that "the common interest doctrine is completely unleashed from its moorings in traditional privilege law when it is held broadly to apply in contexts other than when there is dual representation" [emphasis added].

[20] Because of the Court's concerns described above, a direction was issued to Counsel for the parties, requesting submissions on several matters, namely: the reliance in *Pitney Bowes* upon social and cultural values and other relevant factors of that nature; whether CIP was a class or case-by-case privilege; and assistance in understanding the apparent circumventing of Wigmorean SCP principles by the doctrine of CIP. While the parties responded to the direction, the Court was not satisfied that its queries had been addressed.

[21] It was at this point that the Court learned of a recent article by Professor Grace M. Giesel of the University of Louisville's Brandeis School of Law ("End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting" (2011-2012) 95 Marq L Rev 475 [the Giesel article or Giesel]). As the title indicates, Professor Giesel "controversially" concludes that CIP, which she describes as "allied lawyer privilege", should be discarded as a valid privilege principle in both litigation and advisory circumstances. Her thesis is that CIP is incompatible with the doctrine of SCP, while its alleged benefits are outweighed by its costs to truth-seeking legal processes.

[22] Professor Giesel's survey of the evolution of CIP law demonstrated to the Court's satisfaction that its acceptance was "a bit stealthy", disguised as a close cousin of common interest situations in JCP. More importantly, Professor Giesel proved that because of the misapprehension of the relationship between CIP and JCP, at no time in its long history had any meaningful legal analysis been carried out on the doctrine of CIP. She also appears to be the first jurist to conduct a cost-benefit analysis of the doctrine.

[23] The Court next learned that the Giesel article was quoted in *Ambac*. The New York Court of Appeals, by a majority of 4 to 2, rejected the claim of CIP, restricting the doctrine's application to the context of litigation, including circumstances of anticipated litigation. It is upon reading this decision that the Court understood that thirteen American States have rejected CIP's application to commercial transactions.

[24] *Ambac* is relevant for a number of reasons. It appears to be the first time in 145 years of all forms of CIP application that a court has conducted a form of cost-benefit analysis. The Majority concentrated on the costs, while the Dissent mostly considered the benefits, and also challenged the logic of a distinction in its application to litigation, but not advisory circumstances, when SCP applied across all fields of legal advice. The Majority limited its analysis to the advisory context and found that the costs of CIP outweighed its benefits.

[25] It is of some importance to this case that while the Majority in *Ambac* agreed with the conclusion in the Giesel article that CIP could not be reconciled ("was not coextensive") with SCP, it did not rely on her thesis that this should be a ground to reject all forms of CIP. The

Majority could not do so without undermining its conclusion that CIP applied to litigation-related circumstances, but not advisory CIP. Instead, *Ambac* recognized the theory relied upon by the Respondents according to which CIP acts as a defence or exemption to waiver of SCP. The Majority found that it was reasonable to exempt the waiver in the litigation CIP context, but not for commercial transactions based on its cost-benefit analysis of the two forms of CIP. This distinction and the soundness of its reasoning is a significant issue in this decision. The Court concludes that the proper distinction between these two forms of CIP should be based on the underlying differences between litigation privilege and SCP. The Court relies upon the Supreme Court decision of *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para 7 [*Blank*] in which it declared them to be "distinct conceptual animals and not two branches of the same tree".

[26] The Court provided the Giesel article and the *Ambac* decision to the parties and requested their comments on the issues they raised. The Respondents (which for most purposes hereafter when referring to submissions will include the Intervener) provided fulsome responses rejecting the Giesel thesis and the application of the *Ambac* decision on several grounds, which the Court attempts to respond to in its analysis.

[27] As a result of its analysis, the Court respectfully concludes that *Pitney Bowes* is not binding because it was a JCP case. The Court also disagrees with its conclusions that advisory CIP may be supported on the policy grounds of enhancing social and economic values in the commercial transactions it was said to enable, or by an "expectation interest" of confidentiality.

[28] The Court further rejects CIP as an acceptable form of SCP for a number of reasons. These include among others:

1) CIP entered the law of privilege under a cloud of confusion as being similar to JCP and an appropriate extension of litigation CIP.

2) Advisory CIP cannot be rationalized as an appropriate extension of litigation CIP. Litigation privilege and SCP are distinct conceptual animals having different doctrinal rationales. Litigation CIP is compatible with the strategic advisory foundation of litigation privilege, while advisory CIP is irreconcilable with and destructive of SCP founded on maintaining the solicitor-client relationship.

3) Accordingly, the Court respectfully concludes that *Ambac* was correctly decided but on the wrong legal principle for failing to reject advisory CIP because it cannot be reconciled with SCP doctrine. For the same reason, the Court concludes that the Giesel article was unsound in rejecting litigation CIP based upon its incompatibility with SCP doctrine, but correct in the rejection of advisory CIP on those grounds.

4) Advisory CIP is in an inherent conflict with and destructive of the rational underlying SCP such that rationalization of advisory CIP as a "defence" to waiver is unsustainable, as are its other rationales of being supported by expectation interests or the emerging doctrine of selective waiver. As advisory CIP is incompatible with SCP doctrine, there is no necessity to undertake a cost-benefit analysis of its effects.

5) Nevertheless, an analysis of advisory CIP with respect to factors relevant to the administration of justice demonstrates that the costs significantly outweigh the benefits. Indeed, advisory transactional CIP undermines the administration of justice in that it only enables transactions that anticipate litigation.

6) Policy issues relating to the social and economic values of commercial transactions said to be enabled by advisory CIP are irrelevant to SCP. In any event, those policy values allegedly said to be promoted by advisory CIP are speculative, unnecessary in relation to enabling most transactions, and otherwise limited to fostering transactions

that anticipate litigation that undermine the administration of justice. As well, those commercial transactions appearing to constitute much of the jurisprudence relating to advisory CIP are of no, or questionable economic or social benefit to society.

II. Statement of Facts

[29] IGGillis Holdings Inc. [IGHI] is validly incorporated under the laws of the province of Alberta. Ian Gillis is the sole director and one of the shareholders of the Corporation.

[30] The Respondents owned Two Bit Holdings Inc., which became one of the corporate partners in the United Diamond Partnership formed in 2006. Mr. Gillis was the Executive Director of the United Diamond Partnership, which owned assets in a business engaged in the manufacture, engineering and development of drill bits and related technologies, products, and processes.

[31] The Respondents were also direct and beneficial shareholders of United Diamond Ltd., another partner corporation in the United Diamond Partnership. Mr. Gillis was also a Director of United Diamond Ltd.

[32] In 2007, the Respondents entered into a series of transactions ultimately resulting in a sale of the assets of the United Diamond Partnership and the concurrent sale of the shares of the corporate partners in the Partnership. Abacus was the purchaser of the shares through a nominee corporation.

[33] Abacus structured the purchase of the shares of the corporate partners of the United Diamond Partnership through the transactions. Between January and December 2007, Abacus presented the shareholders of the partners of the United Diamond Partnership with information and documents

describing the transactions to be entered into for the sale of the issued and outstanding shares of the partners of the Partnership.

[34] Abacus is composed of a large group of corporations, partnerships and trusts. Abacus's website describes itself as follows:

> Abacus Private Equity, for over fifteen years, has focused on maximizing cash proceeds to vendors that are selling their assets or shares. Abacus acts as a principal in its transactions, using its time tested principal approach to delivering additional value for vendors. Abacus places a special emphasis on the taxation elements of its transactions, seeking to provide additional value for vendors through efficient transaction structures. Abacus employs some of the leading Canadian tax practitioners in its acquisition operations and enjoys close, long-term relationships with the top tax advisors in the largest Canadian accounting and legal firms. Abacus is owned by the Hillcore Group (www.HillcoreGroup.com). Since 2005, the Hillcore Group, directly or indirectly through its investments funds, has closed transactions with an aggregate asset value in excess of $6.5 billion with $670 million in 2014 alone. Entities under the Hillcore Group management have an asset value in excess of$3.2 billion, as of December 31, 2014. The Hillcore Group has offices in Toronto, Vancouver, Calgary and Montreal, and, in its various groups and portfolio companies, employs approximately 2,500 people through Canada.
>
> [emphasis added]

[35] Abacus' business model is to buy shares of target corporations from their shareholders and sell the corporations' assets to third parties (or operate the target corporations as an ongoing business) in a tax-effective manner.

[36] On December 20, 2007, Abacus, through a directly or indirectly wholly-owned subsidiary named UDL Acquisitions Ltd., acquired the shares of United Diamond Ltd. and Two Bit Holdings Inc. from their shareholders.

[37] In the Transaction, Abacus was represented by the law firm of Fraser Milner Casgrain LLP [FMC] (now called Dentons Canada LLP) and particularly by Mr. Nitikman, a partner in FMC's Vancouver Tax Group. Mr. Nitikman had represented Abacus on many previous deals.

[38] The vendors, including IGHI, which was owned by Ian Gillis, were represented by Mr. Kirby, a tax partner in the Edmonton office of the law firm Felesky Flynn LLP, and by Ogilvie LLP, a national law firm with an office in Edmonton, Alberta that acted as corporate Counsel, and by Kingston Ross Pasnak LLP, a firm of chartered accountants in Edmonton, Alberta [collectively, the Respondents' Advisors].

[39] Negotiations and discussions between Mr. Kirby and Mr. Nitikman relating to the Transaction commenced in late November 2007 and continued until and after the Transaction closed.

[40] In the course of these negotiations and discussions, Mr. Nitikman drafted various tax memoranda (including the Abacus Memo) and circulated them to Abacus and to the Respondents' Advisors, particularly with respect to the taxation elements of the Transaction for the purpose of obtaining additional value for vendors through efficient transaction structures.

[41] The Respondents' Advisors, particularly Mr. Kirby, commented on and discussed these memoranda extensively with Mr. Nitikman. Notably, Mr. Kirby contributed through emails and telephone calls with respect to the taxation elements of the Transaction.

[42] An example of the joint effort of Counsel may be seen in the series of emails exchanged between them describing how they worked together in seeking a common solution to a problem concerning taxation on dividends. This refers to privileged emails which were inadvertently disclosed and contained in the Applicant's affidavit, the advisory contents of which are not revealed in this example.

[43] In the emails, Mr. Kirby first raises a specific problem after reviewing a memo from Mr. Nitikman. It is followed by a reply email from Mr. Nitikman describing the solution in terms of the application of certain provisions of the ITA. Mr. Kirby thereafter responds by raising a further provision of the ITA, questioning whether the provision applies. After further back and forth, Mr. Nitikman acknowledges the nature of the problem raised by Mr. Kirby and provides an additional solution in relation to taxation law. This solution would affect the structure of the Transaction. The email chain concludes with Mr. Kirby offering "another option" and indicating that he is "crunching some numbers". All of this correspondence is copied to Michael Doner, the instructing Abacus employee, on behalf of Abacus. It is presumed that the Respondents would similarly have been kept abreast of these discussions by Mr. Kirby.

[44] The legal advice also travelled in both directions, as Mr. Kirby's opinions were simultaneously provided to his client and communicated to Abacus. All these communications were, to some extent, in the form of negotiations, in that the Respondents had to be satisfied with

the “added value” achieved through tax reduction to arrive at the deal, including the risk of going forward on that basis. Mr. Nitikman represented to the Court that there were no negotiations on the price of the shares or other significant business issues in the deal.

[45] Thus, there exists no clear example of a client request for advice and the advice being provided and thereafter being disclosed to a third party, or the third party’s lawyer. The client is Abacus, but the advice is in the negotiations of the parties which consist of back-and-forth discussions in which Mr. Kirby is also providing taxation advice that is being communicated back to Abacus. The legal advice culminates in the Abacus Memo, which is primarily the work product of Abacus, based on its significant experience in similar transactions, but with the contribution of the Respondents’ lawyer, at least as depicted in the disclosed emails.

[46] The purpose of circulating such memoranda and diagrams was to ensure that Mr. Kirby (a) agreed on the steps in the Transaction that would be taken to purchase the shares, (b) understood the tax and legal risks involved in such steps, and (c) had the opportunity to discuss such risks and negotiate changes to the Transaction to minimize or allocate such risks.

[47] In many of Abacus’ transactions, it instructs its Counsel very early in the transaction to negotiate an agreement with the vendor’s Counsel that all communications between them and other parties involved that relate to the transaction will be on a CIP basis.

[48] Mr. Doner has sworn an affidavit and filed with the Court’s Registry a sealed envelope containing a series of emails between Mr. Nitikman and Mr. Kirby, the first of which Mr. Nitikman sent to Mr. Kirby on Mon 26/11/2007 6:55 AM and the last of which Mr. Kirby sent to Mr. Nitikman

on Tue 18/12/2007 8:46AM, confirming that Mr. Kirby and Mr. Nitikman agreed that all communications relating to the Transaction were on a CIP basis. These emails were not the subject of any submissions at the hearing and have been returned in their sealed envelope along with other memoranda filed with the Court.

[49] On December 17, 2007, the Abacus Memo was provided, by Mr. Nitikman on behalf of Abacus, to Mr. Kirby on behalf of the Respondents.

[50] On December 20, 2007, Abacus, through a directly or indirectly wholly-owned subsidiary named UDL Acquisitions Ltd., acquired the shares of United Diamond Ltd. and Two Bit Holdings Inc. from their shareholders.

[51] As a result of the transactions, the Corporation and Mr. Gillis directly and beneficially received amounts not less than $26,928,326.82.

[52] The Canada Revenue Agency [CRA] is of the view that the transactions entered into in 2007 by the Respondents as corporate partners in the United Diamond Partnership may have been entered into for the purpose of maximizing shareholder benefit by avoiding payment of the tax triggered by the sale of the corporate partners' assets.

[53] By the Requirements, each dated August 7, 2013, the Respondents were asked to provide, among other things, a copy of a letter of intent, or similar documentation, issued by Abacus between the dates of January 1, 2007 and December 20, 2007 to the Respondents.

[54] On October 10, 2013, the CRA received a package from Mr. Kirby with a letter dated October 9, 2013. In the letter, Counsel representing the Respondents stated that no formal letter of intent was entered into between the Corporation and Abacus but that the transactions were described in a memorandum and diagrams provided by Abacus to the Corporation through their Counsel in the Abacus Memo. In his letter, Mr. Kirby stated that the Abacus Memo was subject to SCP.

[55] On December 17, 2013, an officer of the CRA attended at the offices of Felesky Flynn LLP to review documentation relating to the transactions. During that meeting, further documents were provided to the CRA. The CRA was not, however, provided access to the Abacus Memo. The CRA was advised that the Respondents were claiming privilege over the Abacus Memo.

[56] During the course of the collections activity in respect of the Respondents, the CRA also issued, on October 8, 2014, a Requirement for Information and Documents pursuant to section 231.2 of the Act to Abacus [the Abacus requirement]. The Abacus Memo has not been provided to the CRA.

[57] In accordance with a direction of the Court dated May 27, 2016, the Respondents filed with the Court the Abacus Memo in a sealed envelope. The Respondents have not waived CIP over the Abacus Memo and do not consent to its disclosure to the Applicant.

III. Legislative Framework

[58] The legislative framework consisting of sections 231.2 and 231.7 of the Act is included as an Annex.

IV. Issues

[59] This application raises the following issues:

1. Is the Abacus memo *prima facie*, protected by SCP?
2. Was the Abacus memo protected by CIP in accordance with *Pitney Bowes* and its supporting jurisprudence?
3. Is CIP a valid constituent of SCP?

V. Analysis

A. *Is the Abacus Memo Prima Facie Protected by Solicitor-client Privilege?*

(1) The Law of SCP

(a) *Onus of proof*

[60] In an application under section 231.7 of the Act, once the Applicant proves proper service of the Requirements in compliance with subsection 231.2(1), the onus shifts to the Respondents to prove that the documents withheld are covered by privilege (*Canada (National Revenue) v Lee*, 2015 FC 634 at para 44). If satisfied, the onus then shifts to the Applicant to prove that privilege has been waived or otherwise lost (*Canada (National Revenue) v Thornton*, 2012 FC 1313 at para 26).

(b) *Privilege only applies to legal advice, broadly understood*

[61] Legal advice (as opposed to business advice) provided orally or in writing by a lawyer to his or her client is privileged (*R v Campbell*, [1999] 1 SCR 565 at para 50; *Superior Plus Corp v R*, 2015 TCC 132 at paras 38, 46, aff'd 2015 FCA 241). In relation to the legal advice privilege (as opposed to business advice), what matters is whether the lawyers are being asked qua lawyers to provide legal advice: *Three Rivers DC v Governor and Company of the Bank of England (no 6)*, [2004] UKHL 48 at para 58 cited in *Behague v Revenue & Customs*, [2013] UKFTT 596 at para 21 (TC)).

[62] Moreover, "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context." (*Balabel v Air India*, [1988] Ch 317 at 330 (Eng CA), cited with approval in *Blood Tribe v Canada (Attorney General)*, 2010 ABCA 112 at para 26, itself cited with approval in *Slansky v Canada (AG)*, 2013 FCA 199 at para 77 [*Slansky*])

(2) The Abacus Memo is *prima facie* protected by SCP

[63] The Minister advances two submissions that require consideration by the Court. The first is that tax planning communications are not privileged, including advice given by lawyers for accounting or tax planning purposes. On this point, the Minister cites the decision of Mr. Justice Mosley in the matter of *Canada (National Revenue) v Revcon Oilfield Constructors Inc*, 2015 FC 524 at para 20 [*Revcon*]). Second, the Applicant argues that the Abacus memo is not a legal communication because the lawyers involved were not engaged in providing legal advice or

otherwise acting as lawyers, but rather negotiating a commercial deal. Thus, Mr. Nitikman was acting as a business counselor or in some non-legal capacity such that his advice was not protected by SCP: *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 10 [*Blood Tribe*].

[64] With respect to the *Revcon* decision, in my view the passage referred to by the Applicant for the notion that the tax planning advice of lawyers is not privileged and does not represent Justice Mosley's conclusion on the matter. This is clear at paragraphs 29-32 of the decision where the learned Judge concluded that a solicitor's letter including "legal advice with regard to the income tax reporting requirements and tax consequences of the transactions for named individuals" was privileged. Moreover, in referring to tax planning, Justice Mosley was relying upon the decision of Madam Justice Heneghan in *Belgravia Investments Ltd v Canada*, 2002 FCT 649 [*Belgravia*]. This decision concerned SCP for non-legal professional advisors. Also, paragraphs 45-48 in *Belgravia* referred to in *Revcon* stand for the proposition that facts contained in a privileged document are not privileged from discovery.

[65] I also cannot agree with the Minister's submission that the Abacus memo prepared by Mr. Nitikman did not contain legal advice for the parties to whom it was communicated. Because of the nature of this issue, the Court exercised its discretion to review the Memo. It had been provided in a sealed envelope in accordance with the Court's direction. I concluded that it was necessary to review the document in order to adjudicate the existence of a privilege in accordance with the principles enunciated in *Blood Tribe* at paragraph 17.

[66] The Memo described a number of discrete steps or transactions that would be necessary for the purchase and sale of IGHI shares to Abacus. Each step comprised a diagram visually explaining the transaction. Each diagram was accompanied by a detailed description of the tax consequences in reference to relevant statutory and jurisprudential principles that were said to apply. While the diagrams depicting the transactions might not be said to be privileged, I understand that this information is known to the Minister. I am satisfied that the essential nature of the Memo is legal in nature. It describes the tax consequences based on an analysis of the applicable legal framework thought to apply resulting from the planned purchase and sale of the IGHI shares through each step of the transactions making up the Transaction. There is no evidence that either lawyer is acting as a business counsellor or in some other non-legal capacity.

[67] Of greater concern to the Court than the obvious legal nature of the Abacus memo is the manner by which the contents of the memo were compiled to form the legal opinions that it contains.

[68] In this sense, the facts of this case are distinguishable from the other cases in this area where the solicitor-client relationship was clearly defined in the sense that the legal advice was sought by the client on a specific issue which ultimately was shared with the other parties. In this case, the lawyers of both clients were working together to jointly arrive at an optimal tax reducing structure for the Transaction. As such the Court concludes that the Abacus memo was the fruit of cooperative efforts of both lawyers who were highly experienced in the legal considerations of income tax and related commercial law subjects. The Court understands that it

is in this sense that the Applicant argues that the circumstances are tantamount to the negotiation of a commercial contract, disguised as an exchange of legal advice.

[69] However, this does not mean that a business plan cooperatively arrived at based upon the consequences of implementing counsels' legal advice to achieve tax savings renders the Memo a business record. The content of the Memo is almost exclusively advice describing the legal effects in terms of each step in the Transaction.

[70] I disagree that two parties mandating their lawyers to work together on behalf of both clients to find a "business solution" to their mutual advantage, but based upon the consequences of implementing their legal advice on the specific issue of tax savings, renders the fruit of their labour a mere business record as argued by the Applicant, given the almost exclusive legal content of the Memo. I also do not find that the Memo is a business record because the parties' lawyers worked together at each step of the Transaction to work out solutions based on legal conclusions. Similarly, the Memo remains essentially legal advice for their respective clients even though the parties were required to cooperate to implement the overall tax plan to reduce taxes.

[71] Whatever issues arise out of the two parties working jointly by means of bi-directional communication of legal advice is a matter for analysis under the doctrine of CIP. The Respondents argue that courts place the doctrine of SCP on a pedestal, requiring an almost absolute protection, as is most convincingly described by Madam Justice Trudel speaking for the

Federal Court of Appeal in *Thompson v Canada (National Revenue)*, 2013 FCA 197 at paras 34-37:

> [34] Solicitor-client privilege is one of the most revered doctrines under the common law, described by the Supreme Court of Canada as "one of the most ancient and powerful privileges known to our jurisprudence". It is generally seen as a "fundamental and substantive rule of law": *R. v. National Post*, 2010 SCC 16 (CanLII), [2010] 1 S.C.R. 477 at paragraph 39, quoting *R. v. McClure*, 2001 SCC 14 (CanLII), [2001] 1 S.C.R. 445 [*McClure*] discussed by Professor Adam Dodek in "Solicitor-Client Privilege in Canada, Challenges for the 21st Century" (Discussion Paper for the Canadian Bar Association, February 2011).
>
> [35] In *McClure* at paragraph 35, Major J. wrote:
>
> > … solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.
>
> [36] Court reiterated this position in *Lavallee*, adding:
>
> > Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection (at paragraph 36).
>
> [37] More recently, the Supreme Court stated as follows in *R. v. Cunningham*, 2010 SCC 10 (CanLII), [2010] 1 S.C.R. 331 at paragraph 26, [*Cunningham*]:
>
> > It need hardly be said that solicitor-client privilege is a fundamental tenet of our legal system. The solicitor-client relationship is integral to the administration of justice; privilege encourages the free and full disclosure by the client required to ensure effective legal representation.

[72] I conclude, therefore, that the Memo is legal advice provided by the lawyers to their clients in the strictest confidence and protected from disclosure under SCP subject to whether the privilege has been waived or is protected by CIP.

B. *Is the Abacus Memo Protected by Common Interest Privilege?*

(1) The Law of CIP

[73] A good description of the common interest doctrine is found in the decision of *Shipyard Associates, LP v Hoboken (City of)*, 2015 WL 4623470 at 6 (D NJ) [*Shipyard Associates*] cited by the Respondents where the Court described it as follows:

> The common-interest, or community-of-interest, doctrine allows "*attorneys* representing different clients with similar legal interests to share information without having to disclose it to others." In re Teleglobe Commc'ns Corp., 493 F.3d 345, 364 (3d Cir.2007). If applicable, the doctrine protects communications "made between attorneys when all members of the community share a 'common legal interest' in the shared communication." Id. at 364
>
> [emphasis in original].

[74] An important requirement in the application of CIP to transactional circumstances is its evolution from litigation related situations. The decision *In re Teleglobe Communications Corp,* 493 F 3d 345 at 363-364 (3d Cir 2007) [*Teleglobe*] is most commonly cited to describe the expansion from litigation circumstances to include commercial transactions as follows:

> 2. The Community-of-Interest (or Common-Interest) Privilege
>
> Recognizing that it is often preferable for co-defendants represented by different attorneys in criminal proceedings to coordinate their defense, courts developed the joint-defense privilege. In its original form, it allowed the attorneys of criminal co-defendants to share confidential information about defense strategies without waiving the privilege as against third parties. Moreover, one co-defendant could not waive the privilege that attached to the shared information without the consent of all others. Later, courts replaced the joint-defense privilege, which only applied to criminal co-defendants, with a broader one that protects all communications shared within a proper "community of interest," whether the context be criminal or civil. Thus, the community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation, and even in purely transactional contexts.
>
> [emphasis added, notes omitted]

(a) *Common legal interest*

[75] The common interest essential to the doctrine of CIP in a commercial transactions context is said to be that of having the transaction concluded, which also is the foundation for the economic and social values said to rationalize its recognition. This can be seen in this more extensive quote from Pitney Bowes at paras 16-17:

> [16] Other courts have addressed this issue and have concluded that *Buttes* applies when parties to a commercial transaction share legal opinions with one another. Of the cases cited to me, *Fraser Milner Casgrain LLP* v. *Canada (Minister of National Revenue)*, 2002 BCSC 1344 (CanLII), [2002] B.C.J No. 2146, is closest to the circumstances before me. There, the respondent sought production of a number of documents relating to the creation of certain business partnerships. The documents in issue included legal advice that was prepared for one group of companies and then shared with other corporate parties to the proposed transaction. In the course of his reasons, Lowry J. summarized in

the following terms the other recent cases in the area, all of which were cited to me (*Archean Energy Ltd.* v. *Canada (Minister of National Revenue)* (1997), 98 D.T.C. 6456 (Alta. Q.B.), [1997] A.J. No. 347 (QL);*Anderson Exploration Ltd.* v. *Pan Alberta Gas Ltd.*, [1988] 10 W.W.R. 633 (Alta. Q.B.) and *St. Joseph Corp.* v. *Canada (Public Works and Government Services)*, 2002 FCT 274, [2002] F.C.J. No. 361 (QL) (T.D.):

> In *Archean Energy*, legal opinions concerning the tax consequences of a number of share purchases were developed for one company which subsequently provided them to a second company, the purchaser in the transactions. The opinions were held, on application by the purchaser under the *Income Tax Act*, to be privileged because they had been provided to further the common interest of having the transaction concluded and not with the intent of waiving the privilege attached.
> In *Anderson Exploration*, two corporations exchanged confidential documents of a proprietary nature in negotiating a merger. A legal opinion obtained by one was also given to the other. Later, in unrelated litigation involving a subsidiary of one of the corporations, the plaintiff sought access to the documents arising from the merger negotiations. The court held that the disclosure of the documents to third parties did not waive the privilege that attached to all of the documentation because of the common interest associated with their disclosure.
> And in St. Joseph, legal opinions exchanged in the course of a commercial transaction were held to be privileged given that the parties had a joint interest in ensuring its completion (at para.8).

[17] In the result, Lowry J. held that besides the common interest litigation privilege recognized in *Buttes*, the courts should also recognize another kind of common interest privilege: one based on "the parties' common interest in the successful completion of a transaction" at (para. 12). He found that "economic and social values inherent in fostering commercial transactions" favoured the recognition of such a privilege. It is that kind of privilege that he applied to the circumstances before him.

[emphasis added]

[76] At this point, it is important to understand that *Pitney Bowes* was a JCP case, although not recognized as such by the Court. All the parties had decided to retain the services of the same lawyer, who however delivered two opinions, as set out at paragraph 4 of the decision, as follows:

> [4] The parties to the leasing transaction agreed that, where multiple parties needed legal advice in areas where their interests were not adverse, they would all obtain advice from one legal counsel, regardless of the general legal representation in the transaction. In particular, Clifford Chance of the UK provided two opinions on United Kingdom law, both dated December 12, 1997: one addressed solely to Pitney Bowes, and the other addressed jointly to N.S. Group and Royal Bank. It is these two opinions that are the subject of this application.
>
> [emphasis added]

[77] Although two separate opinions were delivered to different clients, the facts indicate that this was a joint retainer of one lawyer to provide opinions that it was understood would be shared amongst them. If this was not a joint retainer, Mr. Chance could not ethically have represented all the parties in providing the opinion. The Court finds this case to be one pertaining to a joint client privilege, as opposed to a SCP, with the difference not apparently recognized by the Court. Although the opinions were prepared for different clients, they were done so with the intention of being shared. As the court stated at paragraph 22, "[t]he opinions were prepared with distribution in mind." The joint client relationship has always been considered to comply with SCP doctrine, as shall be discussed below. It should be recognized however, that prior to Professor Giesel's article the implications of common interests in JCP being distinguished from those in CIP were not recognized in the CIP jurisprudence. This conclusion is similarly apparent from the Respondents' initial reliance on JCP cases to support CIP.

(b) *Expectation Interest as a Rationale for CIP*

[78] Another rationale advanced to support advisory CIP is that of an "expectation interest". It too was relied upon in *Pitney Bowes*, as is evident from paragraphs 18 and 20:

> [18] As mentioned above, in these kinds of cases the real issue is whether the privilege that would originally apply to the documents in dispute has somehow been lost - through waiver, disclosure or otherwise. This is a question of fact that will turn on a number of factors, including the expectations of the parties and the nature of the disclosure.
>
> […]
>
> [20] Still, in many commercial transactions, the parties will want to negotiate on the footing of a shared understanding of each other's legal position. They will seek legal advice from reputable solicitors whose opinions will be respected by the other parties. Indeed, the solicitors may represent more than one party to the deal. The sharing of legal opinions will ensure that each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way. The advice may be provided for one or more party on the understanding that others should be provided copies. The expectation, whether express or implied, will be that the opinions are in aid of the completion of the transaction and, in that sense, are for the benefit of all parties to it. Such circumstances, in my view, create a presumption that the privilege attaching to the solicitor-client communications remains intact notwithstanding that they have been disclosed to other parties.
>
> [emphasis added]

[79] Again, the distinguishing facts are important in supporting Justice O'Reilly's reasoning. If all the parties hired the same lawyer creating a joint solicitor-client relationship, the expectation interest is most certainly that of sharing the opinions amongst the allied lawyers. I expect it was likely required in the lawyer's retainer, or that he would have been aware of the

parties' intentions to do so. This is an expectation that was likely a duty therefore, as a term of the parties' agreement to "all obtain advice from one legal counsel".

(c) *Other Facets of Advisory CIP Doctrine*

[80] Advisory CIP does not require that there be an agreement in writing to create it (*Sable Offshore Energy Project v Ameron International Corp*, 2015 NSCA 8 at para 68). Considering its scope of application, CIP will extend protection to all parties, including accountants and other professionals, who were within the umbrella of the confidentiality that the parties intended to create as against third parties (*Canada (National Revenue) v Welton Parent Inc*, 2006 FC 67 at para 67).This is an important consideration when assessing the scope of the communications that advisory CIP protects.

(2) The Abacus Memo is protected by CIP in accordance with *Pitney Bowes*

[81] The parties' actions are consistent with the basis of CIP relating to the creation of certain business partnerships as described in the reasoning in *Pitney Bowes*. Abacus and IGHI clearly agreed that no waiver of privilege would arise from their lawyers trading the legal opinions and views forming the Memo. The Memo reflected the work of the parties in arriving at a structure of the Transaction intended to minimize tax exposure and was obviously to the mutual benefit of both parties. The Respondents argue that this in fact was the basis for their business deal, as there was no negotiation on the price or number of shares etc. As well, the Memo contained a statement that the CRA might seek disclosure of the Memo, but that its protection by CIP was a condition of its exchange between the parties.

(a) *The parties are not adverse in interest regarding the common interest*

[82] The Minister argued that the parties were adverse in their legal interests, each being on the other side of a purchase and sale arrangement. For that reason, a common interest of the parties in the negotiation and closing of the commercial transaction would not provide a common legal interest as a basis for sharing privileged information without being seen as waving the privilege.

[83] I do not agree with this submission. While it is true that the parties to a purchase and sale agreement are generally adverse in interest, when they are working cooperatively to reduce taxes payable on the sale of shares, the two parties share a common interest with regard to that legal issue. The Abacus memo related only to that issue because legal opinions drove the Transaction. This is similar to the facts in *Pitney Bowes*, where at paragraph 4 it was noted that "multiple parties needed legal advice in areas where their interests were not adverse" and for the goal of "[h]aving the transaction concluded".

(b) *The common interest is a "legal concern"*

[84] The Applicant argued that the Court should adopt the American approach, by which the common interest must be a "legal concern". The Minister submitted that Abacus and IGHI essentially share only "common commercial interest in closing the deal" and that the interest is not therefore essentially legal.

[85] Given my preceding remarks, I disagree with the factual foundation for this argument. But even so, I am satisfied that the American case law cited by the Applicant supports the application of the CIP doctrine in this matter.

[86] In the decision of *Bank Brussels Lambert*, the United States District Court for the Southern District of New York concluded at pages 446-47 that the doctrine applied to situations where parties are represented by separate counsel but engage in a common legal enterprise. The Court used the example of a situation "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel", but distinguished the situation because litigation was not anticipated. Given that the Applicant accepted that *Teleglobe* appears to represent the law in Canada, that applied CIP beyond litigation-related contexts, the *ratio* of the *Bank Brussels Lambert* is not applicable in Canada. This is the first Canadian decision that concludes that CIP should be limited to litigation-related matters.

[87] In any event, the Court discussed what it considered the more "troublesome question", where entities have "parallel interests but are not actively pursuing a common legal strategy", stating at page 447 as follows:

> More troublesome is the question of whether the doctrine can be stretched to apply to communications between entities that have parallel interests but are not actively pursuing a common legal strategy. In its most extreme form, this version of the common interest doctrine has been described as follows:
>
> > A community of interest exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice. The third parties receiving copies of the communication and claiming

> > a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation. The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial. The fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest. *Duplan Corp. v. Deering Milliken, Inc*., 397 F. Supp. 1146, 1172 (D.S.C. 1975).
>
> In practice, however, the *Duplan* court required more than merely concurrent legal interests. Although the court found that a communication with a non-party that was contractually obligated to be the party's legal patent advisor fell within the common interest doctrine, it held that disclosure to the exclusive licensee of the party's patent constituted a waiver. Id. at 1175.
>
> The common interest doctrine, then, has both a theoretical and a practical component. In theory, the parties among whom privileged matter is shared must have a common legal, as opposed to commercial, interest. In practice, they must have demonstrated cooperation in formulating a common legal strategy.
>
> [emphasis added]

[88] The Court went on to find at pages 447-48 that the plaintiffs could not rely upon the CIP doctrine because "the common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation". It continued, "[n]or is there any suggestion that counsel from that firm coordinated its legal efforts with attorneys for any other Bank Group member."

[89] Even in applying this reasoning that it might be arguable that engaging lawyers for the purpose of having the transaction concluded where there is no joint coordinated legal strategy, it is clear to the Court in this matter that Abacus and the Respondents formulated a shared sale

transaction based upon a joint legal strategy to complete the transaction and to that end carefully coordinated the legal efforts of their lawyers which ended up defining the nature of the commercial transactions that the parties concluded.

[90] The present situation also falls into the exception in *Bank Brussels Lambert* because, unlike in that decision, the legal issues motivating the share sale transaction structure were not incidental to the Memo, but its *raison d'être*. In either case therefore, the Memo would be entitled to protection under the CIP doctrine on the basis of the principles enunciated in *Bank Brussels Lambert*, assuming it applied to advisory CIP. I conclude that the American jurisprudence presented to the Court by the Applicant is of no assistance in this matter where the parties are represented by separate counsel but "engage in a common legal enterprise".

[91] Besides, more recent American jurisprudence (see e.g. *Shipyard Associates*; *Teleglobe*) has recognized CIP in circumstances almost identical to those in this matter, which I do not need to describe, inasmuch as I accept the Respondents' argument that CIP in transactional circumstances is strongly implanted in Canadian law and indeed around the common-law world.

[92] Despite the Court's acknowledgment of the challenge it faces in terms of the recognized stature of CIP, it nevertheless is very strongly of the view that CIP is not a valid component of SCP doctrine for the reasons that follow in the next section.

C. *Is CIP a Valid Component of the Doctrine of Solicitor-client Privilege?*

(1) Introduction

[93] The well-established status of advisory CIP as a feature of SCP in common law countries has been aptly demonstrated by the copious case law provided by the Respondents. Recently, however, the article by Professor Giesel and the New York Court of Appeal's decision in *Ambac* reinvigorated the debate on whether advisory CIP is a valid component of the doctrine of SCP. In the United States and Canada, the doctrine arrived under a cloud of confusion with JCP and litigation privilege and has never undergone serious consideration similar to that carried out by Professor Giesel and to some extent in *Ambac*.

[94] In considering the above issue, the Court begins its analysis with an overview of the confusion surrounding the origins of advisory CIP in America and Canada. Second, the Court undertakes an analysis to demonstrate the irreconcilability of CIP with SCP doctrine. This serves as a ground to reject the theory that CIP can be considered to be a defence to the waiver of SCP. Third, the Court considers and rejects the Respondents' argument that current Canadian law favours a liberal construction of privilege that would include advisory CIP. Fourth, the emerging rationales for CIP are reviewed and dismissed. This includes the *ad hoc* theories of expectation interest and selective waiver. They too are irreconcilable with the SCP doctrine.

[95] Throughout its analysis, the Court considers the Giesel article and the New York Court of Appeal's decision in *Ambac*, in addition to responding to the Respondents' submissions in reply to the Court's directions. Besides its novel CIP cost-benefit analysis and its 4 to 2 outcome, it is

difficult to ignore the *Ambac* decision, coming as it does from the state of New York, where one can presume the highest number of commercial transactions are completed anywhere in the United States. Given that it has upheld the refusal to recognize advisory CIP along with twelve other States, despite all of the jurisprudence provided by the Respondents demonstrating acceptance of the doctrine around the world, the viability of advisory CIP appears to be a very live and unresolved issue.

(2) The Establishment and Recent Expansion of Legal Advisory CIP

(a) *CIP Originated in a Litigation Context in Reliance on Joint Client Principles*

[96] The judicial history of any legal doctrine is important. If there are deficiencies in the reasoning of the evolution of a principle, they will play out in its modern application. I believe this to be the case for advisory CIP. Its principal historical deficiencies in reasoning lie with advisory CIP being thought of as sharing the same purpose and foundation as that of JCP and litigation privilege, when it bears little relation to either, except both also involve a common interest.

[97] Although historically confusion with JCP added to the problem and came first, the essential error in advisory CIP's history, in the Court's view, arose when it was thought to be supported by the same rationale that underlines litigation CIP. In failing to recognize that litigation privilege and SCP are "distinct conceptual animals", advisory CIP was established by coat-tailing on litigation CIP. This allowed the doctrine to be established without a proper analysis of its compatibility with SCP doctrine. A re-evaluation of this issue demonstrates

advisory CIP's incompatibility with the SCP doctrine, as well as recognition that CIP provides no benefit to the administration of justice. In fact, it undermines it.

[98] The Giesel article provides a comprehensive analysis of the history of the development of CIP in the United States. Her review, however, does not describe the evolution of advisory CIP from litigation related CIP. Professor Giesel subscribes to the theory that all forms of CIP, not including JCP, should be rejected on the basis of their incompatibility with SCP doctrine. On this point, I respectfully disagree with her, as I find that CIP principles are not irreconcilable with the litigation privilege doctrine. I therefore limit the application of her analysis to advisory CIP, which I agree is incompatible with the SCP doctrine.

[99] This does not mean that the Court concludes issues of JCP are irrelevant to the history or the analysis of advisory CIP. CIP makes its first entry into Canadian law in the Ontario Court of Appeal and at the Supreme Court, in *obiter* in *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 [*Pritchard*], in circumstances of litigation related joint client relationships. Moreover, as noted, the *Pitney Bowes* decision was also a JCP situation. JCP has definitely confused the discussion of advisory CIP, as evident from the many "CIP" cases that are either litigation related or joint client situations.

[100] Having voiced my disagreement with one aspect of the Giesel article, I should point out her important contribution to the issues discussed in this decision. Her article is significant for several reasons, in addition to delineating the distinction between CIP and JCP. She also is the first jurist that I am aware of who conducts a cost-benefit analysis on CIP. I believe this may

have inspired the judges in *Ambac* to follow suit, including the Majority agreeing that the costs of advisory CIP outweigh the benefits. Most importantly however, she demonstrates the incompatibility of (advisory) CIP doctrine with the principles of solicitor-client privilege described by Professor Wigmore. In this respect, she awakens the legal world to the disconnect between SCP theory and advisory CIP. This highlights the absence of any congruity of the different rationales said to justify CIP with the principles of SCP or the administration of justice. These issues are the focus of the Court's analysis below.

(b) *Confusion with JCP*

[101] The first recorded occurrence of CIP was in a criminal law matter related in the 1871 Supreme Court of Virginia decision of *Chahoon v Commonwealth*, 62 Va 822 (Sup Ct 1871) [*Chahoon*]. In that case, Mr. Chahoon met with two other defendants and their lawyers in a matter of criminal conspiracy. During the trial, Mr. Chahoon's lawyer sought to question one of the lawyers about what Mr. Chahoon had said at the meeting. The Court concluded that the lawyer was not required to answer the question as a matter of privilege. In reaching its conclusion, the Court offered the following reasons (at 841-842):

> And can it make any difference in this case, that he was employed as counsel alone by Sanxay? The parties were jointly indicted for a conspiracy to commit a particular crime, and severally indicted for forging and uttering the same paper. They might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communication. They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was

> in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client.
>
> [emphasis added]

[102] The Court's conclusions in *Chahoon* were thereafter applied and relied upon as the foundation of the privilege. However, there can be no doubt that the Court in *Chahoon* relied upon JCP principles in a situation where clients were being represented by separate counsel, thereby applying the JCP doctrine to a CIP scenario.

[103] Professor Giesel is highly critical of the *Chahoon* decision and disagrees that allied lawyer situations as in *Chahoon* are analogous to JCP situations under the doctrine of SCP for a number of reasons outlined below. While the Court agrees with her reasoning, its conclusions are more nuanced. Insofar as CIP was being applied in the field of litigation, I conclude that the *Chahoon* decision is correct, but based on the wrong reasons because of its mischaracterization of the facts of the case to be those of "in effect" a joint client relationship. I believe the correct rationale is that sharing legal advice on a common interest in litigation may be consistent with the strategic adversarial nature of litigation, which is discussed below. Even on this basis however, the Court in *Chahoon* relied on strategic considerations: "They had the same defence to make, the act of one in furtherance of the conspiracy, being the act of all" (at 841-842).

[104] All communications in a JCP situation are within the solicitor-client relationship and the privilege is coherent with the SCP doctrine. Conversely, the communications in an allied lawyer CIP situation are not limited to those between a lawyer and his or her client seeing as the lawyer does not have a solicitor-client relationship with the other parties who have their own separate counsel. Therefore, to apply the doctrine of SCP to communications in the allied lawyer setting

is to protect communications that are not solely between an attorney and the attorney's client and therefore not essential to the relationship. Such an application of the doctrine of SCP is contrary to its own *raison d'être*, that is encouraging full and frank disclosure of information by the client to the lawyer and by its essential nature being to the benefit of the administration of justice.

[105] Second, the duty of loyalty owed by the lawyer to all joint clients informs the ethical limits of joint client representation. This ensures that the lawyer exercises independent judgment on behalf of each client to prevent any risk of adverse impact occurring to any member of the joint client class due to the lawyer's responsibilities to one of the other joint clients. The duty of loyalty requires the lawyer in a joint-client context to ensure that the joint clients consent to the sharing of all the information received by the lawyer. That same duty of loyalty further requires that the lawyer withdraw if one client decides some matter material to the lawyer's representation of the parties should be kept from the other. It is only the client's lawyer who has this duty and whose privileged advice may be relied upon by the client to assist him or her in complying with the law.

[106] Conversely, lawyers working in common interest under a CIP agreement do not owe a duty of loyalty to other lawyers' clients, and thus share no concerns of being in a conflict of interest situation. As such, there are no requirements to share information between all common interest parties. The sharing of information occurs only to the extent that it is in the best interest of the parties to work together on the legal common interest. This distinction between JCP and CIP was noted by the Majority in *Ambac*, pointing out that in the joint client situation "the clients

indisputably share a complete alignment of interests in order for the attorney, ethically, to represent both parties" (at 631).

[107] Third, joint client representation adheres to the rationale of SCP, while CIP does not. JCP was recognized as early as 1854 in the decision of *Rice v Rice*, 53 Ky 335 at 335-336 (1854) [*Rice*] to be a form of SCP. Consequently, applying SCP to the joint client representation setting "is not an expansion of the application of the attorney-client privilege from its traditional metes and bounds of the 1800s" (Giesel at 523).

[108] This raises issues as to the source of the statements in *Chahoon* that "nothing can be more certain" and that "all authorities agreed" that JCP applied to the situation (*Chahoon* at 839-40). The Court cited no case law in support of this claim. The only explanation for the statement that all the authorities agreed on the point is that the Court mistakenly relied upon the earlier joint client jurisprudence, i.e. *Rice*, to support CIP on the basis that they were "in effect" in the same situation. This is clearly an erroneous view that discarded the fundamental principles of the SCP doctrine. Regrettably, reliance on joint client situations in enabling CIP doctrine continues right up to recent times.

[109] Finally, a common interest is necessary to establish CIP, but is not to establish JCP. The privilege for joint clients is based upon meeting the requirements of SCP, which is subject to stringent rules concerning the lawyer's duty of loyalty and avoiding being placed in a conflict of interest. The fact that the parties share a common interest is relevant to meeting the ethical requirements for a lawyer to represent joint clients, but is not a requirement of joint client

representation. So extensive is the co-mingling of the two principles that Professor Giesel refers to circumstances where CIP doctrine has taken hold and now requires a demonstration of a common interest for JCP to apply, where SCP law does not require it (see Giesel at 524ff).

[110] Accordingly, this Court agrees that the historical expansion of allied lawyer privilege was "a bit stealthy" (Giesel at 511). Professor Giesel notes that in the United States, from 1871 until 1942, no further cases involving CIP were reported. Then, between 1942 and 1965, three cases applied *Chahoon*, being *Schmitt v Emery*, 2 NW (2d) 413 (Minn Sup Ct); *Continental Oil Company v United States*, 330 F (2d) 347 (9th Cir 1964); and *Hunydee v United States*, 335 F (2d) 183 (9th Cir 1965). These cases were all litigation-related, and none recognized that the Court in *Chahoon* had relied on JCP principles as the basis for its decision nor considered whether applying privilege in the allied lawyer situation furthered the goals of, or was in compliance with, the rationale of SCP.

(c) *Litigation CIP is extended to advisory CIP*

[111] Although it is not clear exactly when CIP was applied outside of litigation to advisory legal circumstances, the following description appears to be its most likely evolution. In an article written by Daniel J Capra ("The Attorney-Client Privilege in Common Representations" (1989), 20:1 Trial Lawyers Q 20 [Capra]), the author annotates the decision of *United States v Zolin*, 809 F (2d) 1411 (9th Cir 1987) [*Zolin*] as follows: "clients need not be threatened with litigation for common interest rule to apply; statements protected where clients had a common interest in sorting out the affairs of the Church of Scientology" (at 21).

[112] In considering the reasons in *Zolin*, it would appear that its actual precursor is in the form of an *obiter* statement from the 1974 decision of the District Court of Maryland in the matter of *Burlington Industries v Exxon Corp and Amtech, Inc*, 65 FRD 26 (Md Dist Ct 1974) [*Burlington Industries*], which it cited. The decision in *Burlington Industries* is *obiter* because it was a litigation-related matter. The Court in that case appears to have raised the expanded scope of advisory CIP because the defendants' submissions relied on the recently Proposed Federal Rules of Evidence, Rule 503(b). The Rule included an extension of privilege to CIP non-litigation circumstances. I cite the brief relevant portions of the reasons in *Burlington Industries* at 36- with my emphasis, as follows:

> IX. *Confidential Communications Between Party's Counsel and Nonparty Third Person with whom Party had a Community of Interest*
>
> In plaintiff's categories V, XIII, XVI, and XVII, plaintiff asserts a privilege for confidential communications exchanged between plaintiff's counsel and the representatives of a corporation not a party to the present action. Plaintiff contends that the privilege exists because at the time of the communications plaintiff had a community of interest with respect to the patent in issue. Plaintiff alleges that at the time of the communications in question, plaintiff and Standard Oil Company (Indiana) were joint licensors of patents. The patent in controversy in this action was included in the joint licensing program. Consequently, the joint licensors had a mutual interest in the success of the patent.
>
> Rule 503(b) of the Proposed Federal Rules of Evidence is in accord with the plaintiff's position. It states in part:
>
> > "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, [(1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or] (3) by him or his lawyer

> to a lawyer representing another in a matter of common interest, … [the remainder of the rule is as follows: "or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client." (Proposed Federal Rules of Evidence, Rule 503(b), 56 F.R.D. 236 (1973))].
>
> [emphasis added]

[113] The District Court then refers to four cases (including the decisions of *Transmirra Products Corp v Monsanto Chemical Company*, 26 FRD 572 (SD NY 1960), *Vilastor-Kent Theatre Corp v Brandt*, 19 FRD 522 (SD NY 1956), and *Stix Products, Inc v United Merchants & Manufacturers, Inc*, 47 FRD 334 (SD NY 1969)) where CIP was allowed in situations of anticipated litigation, and comments as follows:

> Unlike the nonparty in *Transmirra*, there is no evidence here that Standard Oil (Indiana) has ever been sued in a prior action as a result of the patent now in question. Nor is there any evidence to show that Standard Oil has been threatened with litigation comparable to the threat received by the potential codefendant in *Vilastor*, or the threat of litigation received by the third-party witness in *Stix*. Nevertheless, joint licensors do share a mutual interest in the success of their joint licensing program. Such mutual interest may well necessitate continued communication between the attorneys of the joint licensors. Upon a proper showing of the existence of such joint licensing program, documents prepared by attorneys in anticipation of litigation involving their clients, and exchanged in confidence between attorneys representing the joint licensors, will not lose the protection of the work product doctrine. Unless a proper showing of the need hardship exception is made, exchange of work product between attorneys for plaintiff and Standard Oil (Indiana) will remain immune from discovery.
>
> [emphasis added, notes omitted]

[114] Thus, while the court in *Burlington Industries* generally approved of extending CIP to non-litigation circumstances, the facts relate to work product of documents prepared in anticipation of litigation. Thus, only did litigation CIP come into existence by being confused with JCP, it then passed from the litigation field as *obiter* in anticipated litigation circumstances, based on an unsupported evidentiary rule proposed by a bar association, which was partially and unnecessarily relied upon.

[115] The rationale claimed by Capra (at 20) to support an all-inclusive CIP comprising litigation circumstances was in order to be consistent with Wigmorean SCP doctrine:

> The rationale of the common interest rule is consistent with that of the attorney-client privilege. Since the privilege exists to promote full disclosure of the truth between client and attorney, the same principle applies in a common interest situation, which merely multiplies the number of truth-tellers and confidence-receivers.
>
> [emphasis added]

[116] The Court does not agree with this reasoning, both for its explanation of CIP doctrine applying to litigation-related circumstances, as well as to advisory CIP existing to promote truth between the client and the attorney, when the allegedly beneficial communications are those of a third party, as shall be more particularly described in the Court's analysis below.

(d) *The Recent Explosion of CIP Cases*

[117] Professor Giesel has also raised alarm at what she describes as "the recent explosion" of CIP cases. She complains that the expansion has occurred without any court critically

considering the *Chahoon* decision in the intervening years. She claims that courts in the last forty years, likewise, have accepted the general notion that SCP protects communications arising in an allied lawyer situation. These courts have simply not looked back to critically analyze the *Chahoon* precedent. The import of the error is magnified by the fact that courts are now bombarded by many more such claims. In retrospect, the time for critical consideration of a significant expansion of privilege law was when litigation CIP was adopted as a basis for advisory CIP – when first established as constituent of SCP.

[118] In support of her description of CIP's expansion as a "recent explosion of cases" in American law, she notes that in the decade spanning 1970 to 1979, only five published cases involved claims of privilege in an allied lawyer setting. In the decade from 2000 to 2009, 168 published cases had claims of allied lawyer client privilege.

[119] As was noted by the Majority in *Ambac* (at 632), "one treatise has observed that the common interest exception in these jurisdictions "is spreading like crabgrass to areas the drafters of the Rejected Rule could have hardly imagined" (Wright & Graham § 5493 [2015 Supp])".

[120] Given that transactional CIP is rationalized by encouraging the "free flow of information" between the allied clients and lawyers, the expansion that this represents to the costs to the administration of justice in obstructing the introduction of large amounts of relevant evidence is obviously significant. The Court suspects that the reported cases raising issues of advisory CIP are only a tiny fraction of those where the privilege is being used in conjunction with the

everyday advice provided by commercial lawyers negotiating a commercial transaction where there exists a common interest of having the transaction concluded.

(e) *Canada Has Adopted American Jurisprudence on CIP Similarly in a Litigation and JCP Context*

[121] The Respondents rely upon the Supreme Court of Canada's decision in *Pritchard* for the proposition that merely sharing a common goal is sufficient to create CIP. I set out the short passage from *Pritchard* at paragraphs 22 to 25 in reference to a CIP:

> B. The Common Interest Exception
>
> [22] The appellant submitted that solicitor-client privilege does not attach to communications between a solicitor and client as against persons having a "joint interest" with the client in the subject-matter of the communication. This "common interest", or "joint interest" exception does not apply to the Commission because it does not share an interest with the parties before it. The Commission is a disinterested gatekeeper for human rights complaints and, by definition, does not have a stake in the outcome of any claim.
>
> [23] The common interest exception to solicitor-client privilege arose in the context of two parties jointly consulting one solicitor. See *R. v. Dunbar* (1982), 138 D.L.R. (3d) 221 (Ont. C.A.), *per* Martin J.A., at p. 245:
>
> > The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world. However, as between themselves, each party is expected to share in and be privy to all communications passing between each of them and their solicitor. Consequently, should any controversy or dispute arise between them, the privilege is inapplicable, and either party may demand disclosure of the communication. . . .

> [24] The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome, a "selfsame interest" as Lord Denning, M.R., described it in & Oil Co. v. Hammer (No. 3), [1980] 3 All E.R. 475 (C.A.), at p. 483 [Buttes Gas]. It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest. These include trustee-beneficiary relations, fiduciary aspects of Crown-aboriginal relations and certain types of contractual or agency relations, none of which are at issue here.
>
> [emphasis added]

[122] Thus, *Pritchard* describes the origin of CIP as arising in an Ontario criminal decision involving joint client representation by relying on *R v Dunbar* (1982), 138 DLR (3d) 221 (Ont CA) [*Dunbar*]. It further states that the common interest exception "has since been narrowly expanded" into areas that would also appear to relate to joint clients of a lawyer (*Pritchard* at para 24).

[123] The only underlying basis that could be argued to extend *Pritchard* to an allied lawyer context could arise from the fact that the decision of *United States v McPartlin*, 595 F (2d) 1321 (7th Cir 1979) [*McPartlin*], which *Dunbar* relied upon, was one of allied lawyers working together in a criminal law defence situation. The Court in that matter applied the same reasoning as was used in *Chahoon*: "a project in which Ingram and McPartlin and their attorneys were jointly engaged for the benefit of both defendants" (*McPartlin* at 1336) [emphasis added]. The lawyers were, of course, not jointly engaged by the clients. One has to assume, therefore, that the court meant that they were "in effect" jointly engaged as the Court found in *Chahoon*.

[124] The Respondents argue that the Court in *Pritchard* also recognized an allied lawyer form of privilege by its reference to a passage from Lord Denning's reasons in *Buttes Gas & Oil v Hammer* (No 3), [1980] 3 All ER 475 at 483 (CA):

> There is a privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him - who have the self-same interest as he - and who have consulted lawyers on the self-same points as he - but these others have not been made parties to the action. […] In all such cases I think the courts should - for the purpose of discovery - treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser.
>
> [emphasis added]

[125] As I understand the Respondents' argument, they contend that Lord Denning stated that common interest privilege may apply to multiple clients and multiple lawyer scenarios. I find however, that Lord Denning's comments resemble those in *Chahoon* "in effect" treating all persons as if partners in a single firm. Moreover, the comments were made in a situation where the privilege was "in aid of anticipated litigation".

[126] In conclusion, the admittedly numerous cases cited by the Respondents simply confirm that the allied lawyer component of CIP has entered Canada under the guise of its similarity to JCP in litigation situations. Before this Court, the leading case was also a JCP fact situation, while neither the Federal Court of Appeal, nor the Supreme Court of Canada, or indeed any court

including the *Ambac* court, has yet to fully consider the substantive issues that advisory CIP raises. This will be the first case that attempts to fulfill that very long overdue task.

(f) *Chahoon Continues to be erroneously relied upon in Advisory CIP Cases*

[127] *Chahoon* continues to be recognized and applied as the foundation for the exception to waiver acting to terminate SCP where clients share a common interest. For, example, the Respondents have noted from the recent decision of *Neuberger Berman Real Estate Income Fund, Inc v Lola Brown Trust No 1B2*, 230 FRD 398 (D Md 2005) [*Neuberger*] that CIP originated in the *Chahoon* criminal law case when charges were laid against co-accused. I find that its argument confirms the confused adoption of advisory CIP, via both criminal law and JCP references. I cite the Respondents' submission to the Court's first Direction at para 2.4:

> 2.4 CIP originated in cases where criminal charges were laid against two or more accused persons, each of whom retained a lawyer, who then collaborated with each other in defending their individual clients. See *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B2*, [(2005), 230 F.R.D. 398 (US Dt. Ct.)] where the Court said
>
> > The joint defense or common interest doctrine has its origins in the criminal law, where multiple defendants, each having separate counsel, share information to effect a united defense. [Obviously referring to *Chahoon*] The doctrine has, however, been extended to civil matters. Id. at 248-249; *Duplan Corp. v. Deering Milliken*) ("The 'common interest' arrangement permits the disclosure of a privileged communication without waiving the privilege, provided the parties have 'an identical legal interest with respect to the subject matter of the communication.'")
> >
> > [emphasis added]

[128] At paragraph 2.5 of their submissions, based on the decision in *Neuberger*, the Respondents argue that "[i]t is highly unlikely that either Wigmore or the Court in *Duplan* meant to overturn or discard CIP's historical foundation." However, the Respondents first undercut their own argument, when at paragraph 2.7 of these submissions, they acknowledge that *Duplan* was a case "involving multiple legal entities in the same corporate group or community retaining the same law firm", i.e. therefore, applying *Chahoon*, a criminal CIP case, to a JCP situation. This is a good example of the confusion reigning referred to by Professor Giesel involving CIP and JCP, but this time operating in the opposite direction —where the Respondents rely on a (litigation) CIP case to confirm a transactional JCP decision, although the latter is a long-recognized constituent of American SCP law since 1854 in *Rice*.

[129] More importantly, it appears from research conducted after the responses to the Court's specific direction requesting submissions on the point, that Wigmore did indeed consider the *Chahoon* decision and rejected it as apparently "unsound" (John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 4 (Boston: Little, Brown, and Co, 1905) at § 2328, n 2. See also John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, vol 5 (Boston: Little, Brown, and Co, 1905) at § 2328, n 3):

> 1871, *Chahoon v. Com.*, 21 Gratt. 822,835 (C.J.S. and R.S. being jointly indicted for conspiracy, met for consultation with counsel; each had a counsel, but C.'s was absent; L. was counsel for R.S.; at the trial, R.S. having testified to a statement of C. at the meeting, C. called L. to testify to C.'s statement; but L. claimed the privilege; held, that L. could not testify without a waiver by all three, J.S. having in fact made no waiver; this seems unsound")
>
> [emphasis added]

[130] Wigmore recognized that *Chahoon* was not consistent with JCP/SCP principles. The jurisprudence that relies on *Chahoon* and that has accepted advisory CIP has not considered Wigmorean principles. The *Ambac* decision is the exception. Having had the benefit of Professor Giesel's treatise on CIP, the Majority in *Ambac* was aware that CIP was not — to use its terminology — "co-extensive", i.e. compatible, with Wigmorean SCP. However, as explained below, the Majority in *Ambac* was caught in its own jurisprudential conundrum: it wanted to maintain a distinction between litigation and advisory CIP, while Professor Giesel's arguments attempt to delegitimize both. As a result, nearly all of Professor Giesel's conclusions are consigned to the trash bin. Ultimately the Majority adopts the *ad hoc* rationale that CIP is a reasonable exemption to waiver in the litigation field, but not in non-litigation circumstances.

[131] The Court respectfully concludes that this is the correct result, but on the wrong underlying principle, which should have been that advisory CIP is incompatible with SCP doctrine. The fundamental underlying problem the Court has with *Ambac* is the Court's failure to distinguish between litigation privilege and SCP. If this distinction had been recognized, advisory CIP should have been rejected because it was irreconcilable with SCP doctrine, thereby leaving litigation CIP unaffected by the decision.

[132] Returning to Professor Wigmore's conclusion that *Chahoon* was "unsound", one must not lose sight of the fact that when Wigmore published his treatise, *Chahoon* was the only reported case of a claim of allied lawyers disclosing privileged information and not waiving their privileges. He could not foresee that the case would foster a new widely applied privilege, nor the confusion that has reigned in doing so. There would be no thought of distinguishing between

litigation and SCP privilege, nor any of the arguments that follow below to demonstrate that he was correct in finding that advisory CIP is an unsound privilege doctrine. Nevertheless, Wigmore concluded at the time that, what is now recognized as advisory CIP, was incompatible with SCP, with which conclusion this Court is in entire agreement.

(g) *Jurisprudence Supporting Advisory CIP is Not Determinative of its Legitimacy*

[133] The Respondents have argued that because of the very extensive authority supporting advisory CIP, the Court is required to apply these precedents that are so firmly and undeniably established to now be beyond question. I agree that there appears to be an overwhelming acceptance of advisory CIP in the common law world, except in 13 states of the United States of America. It would appear that the privilege has become a common-place element of SCP today, with the debate focused on delimiting and applying its parameters, as was argued by the Applicant in this case.

[134] The Court nevertheless concludes that the jurisprudence supporting advisory CIP was established under a cloak of confusion with common interests in JCP and litigation privilege and with very little analysis of the factors and considerations relating to the legitimacy of advisory CIP.

[135] To a certain extent the Court also recognizes that the widespread adoption of a rule like advisory CIP may be assisted by an innate tendency of other decision-makers not to confront apparent troublesome issues once the doctrine enters mainstream jurisprudence, in this case back

in the 1970-80 period. This is best explained by the reasoning of Nobel Peace Prize recipient, Daniel Kahneman, in his book *Thinking Fast and Slow* (Toronto: Anchor Canada, 2013). He described a situation he faced in overturning a postulate of "utility theory" that had "stood the test of time" for over 300 years. His comments at page 277 are relevant to the Court's point of view:

> The mystery is how a conception of the utility of outcomes that is vulnerable to such obvious counter examples survived for so long. I can explain it only by a weakness of the scholarly mind that I have often observed in myself. I call it theory-induced blindness: once you have accepted a theory and used it as a tool in your thinking, it is extraordinarily difficult to notice its flaws. If you come upon an observation that does not seem to fit the model, you assume that there must be a perfectly good explanation that you are somehow missing. You give the theory the benefit of the doubt, trusting the community of experts who have accepted it. [Thereafter the author refers to questionable points in utility theory that would stand out] As the psychologist Daniel Gilbert observed, disbelieving is hard work, and System 2 [a deliberate and effortful form of thinking, p13], is easily tired.

[136] In this case, the Court learned of Professor Giesel's "controversial" article. From her analysis, it was learned that she was the first jurist to undertake the "deliberate and effortful" thinking, revealing that CIP was incompatible with SCP doctrine, and that its costs significantly outweigh its benefits. It provided the impetus for this decision.

(3) Advisory CIP as an Exception to Waiver is Irreconcilable with and Eviscerates SCP Doctrine of any Meaning

[137] Having come to recognize that CIP does not appear to be compatible with the rationale of SCP, it appears that the American jurisprudence has adopted a second line of reasoning to

rationalize it. I refer here to the concept of CIP being an exception or defence to waiver of SCP and therefore, not having to be reconcilable with SCP doctrine. To fully consider the Respondents' argument however, two concepts must be well understood: the doctrine of SCP and the doctrine of waiver of SCP.

[138] The doctrine underlying SCP is not controversial. SCP is a class privilege, not a case-by-case privilege, which means that any communications between a client and his or her lawyer relating to the provision of legal services that are made in confidence are *prima facie* protected. Conversely, confidential relationships not protected by a class privilege may nevertheless be protected on a case-by-case basis. Privilege will apply on a case-by-case basis where Wigmore's following four criteria test is satisfied:

> (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 opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
>
> (John T McNaughton, ed, *Wigmore on Evidence*, vol 8, 3rd ed (1961) § 2285 [*Wigmore*]).

[139] While the above factors do not need to be proven to establish that a solicitor-client communication is privileged, Professor Wigmore rightly points out that they are nevertheless the foundation of established class privileges (*ibid*):

> Only if these four conditions are present should a privilege be recognized. That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition sometimes demanded for them. In the privilege for communications between attorney and client, for example, all four are present.
>
> [emphasis added]

[140] The first Wigmore criterion explains the reason why confidentiality alone is insufficient to attract SCP. It is the intention to maintain confidentiality of the communication that is important. As stated in Wigmore, "the communication must originate in a confidence that they will not be disclosed".

[141] The second Wigmore criterion that the "element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties" [emphasis added] is an important pillar of the SCP doctrine. The Supreme Court of Canada in *R v McClure*, 2001 SCC 14 at para 33 [*McClure*] explains the necessity of privilege for the solicitor-client relationship as follows:

> Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle

> communication between the lawyer and client. The need to protect the privilege determines its immunity to attack.

[142] In the context of SCP, the third Wigmore criterion is also satisfied. As was reiterated in *McClure* at para 31:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication (see: *Geffen v. Goodman Estate, supra*, and *Solosky v. The Queen, supra*).
>
> [emphasis added]

[143] The fourth Wigmore criterion illustrates the tension that exists between the speculative benefit of SCP encouraging fuller disclosure of information between a lawyer and his or her client weighed against the obvious costs to the administration of justice. As Wigmore succinctly states, "the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. […] It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth" (at § 2291).

[144] Wigmore's fourth criterion supports the rationale that SCP must be interpreted restrictively so as to limit the privilege because the benefit of encouraging disclosure is of such a speculative nature. Incidentally, the Respondents contend that this rule no longer applies in Canada based on recent constitutional law cases, something I consider and reject in the following section.

[145] The underlying Wigmore rationale for SCP and the principle that it should be interpreted restrictively are also logically related to, and further define, the purpose of confidentiality within the SCP doctrine. Its purpose is to limit the scope of the privilege, as described by Professor Giesel at pages 499-500 of her article:

> The rationale of the confidentiality requirement is that if a client does not care about the confidential nature of a communication, the client will readily disclose all necessary information to the lawyer without the encouragement of the privilege. So, the confidentiality requirement ensures that the privilege applies only where it is needed as an encouragement.
>
> [notes omitted]

[146] The above passage refers to what is known as waiving SCP. As SCP belongs only to the client, it can only be waived by the client. Waiver of privilege is ordinarily established where it is shown that the client: (1) knew of the existence of the privilege; and (2) voluntarily evinced an intention to waive that privilege (*S & K Processors Ltd v Campbell Avenue Herring Producers Ltd*, 1983 CarswellBC 147 at para 6 (BCSC)). For example, there will be a waiver of SCP where a client explicitly or implicitly discloses a confidential solicitor-client communication to a party outside of the solicitor-client relationship. The doctrine of waiver of SCP is inextricably linked to all the Wigmore factors, but most commonly rationalized by the first two. For when a client discloses confidential solicitor-clients communications, these communications are no longer confidential. *Ergo,* the disclosure of a communication protected by SCP indicates that its confidentiality is no longer essential to the full and satisfactory maintenance of the relation between the parties.

[147] When a client receives or discloses a privileged communication to or from a third party or that third party's lawyer, that disclosure is not a communication between a client and that client's lawyer. This type of disclosure does nothing to enhance the relationship between the clients and their respective lawyers and is not essential to the relationship. Wigmore's second criterion that the "element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties" has no application when the benefit arises from the external disclosure of other parties, and the legal advice is that of other lawyers.

[148] The Respondents suggest that even though there is disclosure of confidential information protected by SCP, CIP somehow acts as a defense or as an exception to the application of the doctrine of waiver. Although the Respondents submit that the CIP exception to waiver is "grounded in SCP", they provide no rationale supported by jurisprudence to demonstrate any relationship between advisory CIP and SCP. When one thinks about it, CIP as a defence to waiver has to be a standalone invention, because it operates outside and contrary to the rationale of SCP. That explains why the Respondents eventually contended that "it not need be and is not supported by the same rationale as SCP".

[149] The Court acknowledges that the Respondents' argument is supported by both Canadian and American jurisprudence. Reference has already been made to the *Ambac* decision where CIP was considered an "exception" to waiver. Similarly, CIP was stated to be a "defence" to an allegation of waiver of privilege in *Trillium Motor World Ltd v General Motors of Canada Ltd*, 2014 ONSC 4894 at para 14 [*Trillium*]: "Common interest [privilege] is not a separate class of privilege. Rather it operates to protect privilege from waiver."

[150] However, it is the Court's view that the consequences of modifying the rules on waiver have not been fully thought through. The Court finds that Advisory CIP as an exception or defense to waiver of SCP is irreconcilable with and eviscerates the SCP doctrine of any meaning.

[151] Considering the Wigmore requirements together logically establishes that SCP is founded on an interlocking package of prerequisites. Every piece of the doctrine fits with the rest. It is like a doctrinal house of cards, none of which are individually controversial, while each leans on the other for support.

[152] The first card is the relationship between the client and his or her lawyer. Confidentiality of the communication between them is the foundation of the relationship and the benefit to the administration of justice that the privilege creates. The second card is the benefit arising from encouraging the client to disclose confidential information to his or her lawyer which is considered essential to the relationship and thereby, to the administration of justice. This benefit, however, is speculative and tenuous compared to the obvious and direct obstruction it causes to the administration of justice. The third card is that the privilege must therefore, be interpreted restrictively within the scope of its principles. Confidentiality as the fourth card thereby, plays the role of limiting the scope of the privilege, and thus, determines the purpose of waiver. As the last card, its function is to terminate the privilege when the confidential communication is disclosed to a third party.

[153] Pull out the waiver card and allow disclosure of confidential information based on a claim that the client has a common interest with another client represented by another lawyer,

and down comes the house of SCP cards. When the information disclosed is to or from someone other than the client, the confidentiality of the information is not essential to maintaining the relationship. There is no added benefit to encouraging full and frank disclosure from the client to his or her lawyer and, therefore, to the administration of justice. The restrictive interpretation rule applying to SCP is obviously overridden because the scope of the privilege has been greatly increased beyond the original communication that was protected. The role of confidentiality in limiting the scope of the privilege no longer applies and the cost to the administration of justice by the obstruction of relevant evidence created "by the free flow" of additional information between all the allied parties is increased in a future truth-seeking legal process. This results in unrequited unfairness to the opposing party who is denied additional relevant evidence that may affect the outcome of the legal process.

[154] In conclusion, advisory CIP as a defence to waiver fails to address the fact that its application guts SCP of any purpose or meaning in relation to the exchanged confidential communications. This result occurs because the components and the logic of SCP are interconnected and interdependent. Striking down the waiver principle empties the privilege of all of its function and doctrinal rationale. To think otherwise is similar to removing some essential body part without expecting the person to suffer dire consequences as a result.

[155] Additionally, although SCP doctrine has been eviscerated by CIP, courts advocating its acceptance have not attempted to provide any sustainable rationale to support CIP or even to consider its costs. Apart from the Majority in *Ambac*, the consideration in the case law of the

negative impact of advisory CIP has been like the refrain in the song Home on the Range, "where seldom is heard a discouraging word".

[156] From the Court's perspective, it would appear that in recognizing advisory CIP, an existing speculative benefit to the administration of justice has been leveraged and turned into an expanded benefit for two or more parties in future litigation, at a cost to the opposing party, contrary to the requirements that underpin the rationale for SCP. This is so, particularly with regard to the requirement that SCP be restrictively limited to its principles to prevent undue obstruction to justice and unfairness to opposing parties in future litigation.

(4) SCP Must Be Construed Narrowly

[157] In this doctrinal analysis, there is one further point that the Court feels compelled to answer from the Respondents' submissions. It is that SCP should be construed narrowly. In particular, the Respondents argue that "privilege" should no longer be construed narrowly. Instead, they submit that "Privilege is not to be construed narrowly" as "[i]n 2016, Canadian law is 180 degrees the opposite".

[158] The Respondents rely on numerous cases and statements of commentators in an attempt to support their submission: Adam M. Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis, 2014) at 253, n 379 and accompanying text ("privilege as substantive right of quasi-constitutional status"); *Lavallee, Rackel & Heintz v Canada (AG)*, 2002 SCC 61 at para 24 [*Lavallee*] cited in *Canada (AG) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 38 ("all information protected by the solicitor-client privilege is out of reach for the state"); and

McClure at para 35 cited in *Lavallee* at para 36 ("solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance"). In particular the Respondents quote the Ontario Superior Court's constitutional law decision in *Kaymar Rehabilitation Inc v Champlain CCAC*, 2013 ONSC 1754 at para 45:

> [45] The law of privilege in Canada has undergone a radical transformation over the past 30 years or so. For one thing solicitor client privilege has evolved from a rule of evidence to become a substantive legal right with quasi constitutional status. As privileges go, it is a class privilege which is virtually sacrosanct and will not yield lightly. As long as the communication is given in confidence and is information necessary to obtain legal advice it will be protected subject to very narrow exceptions. It is the very essence of the privilege that it protects potentially prejudicial information. Thus, if the privilege is properly claimed and it has not been implicitly waived by the party claiming the privilege it will be a rare case in the context of a civil action where it will not be upheld.
>
> [emphasis added]

[159] The Court does not accept the Respondents' submission that the rule of construction, that SCP be interpreted restrictively within its limits, has been affected by these decisions. The cases cited express the principle that, in Canada, SCP "if properly claimed" is not to be undermined by laws enacted by legislatures. A privilege that is properly claimed is one that is within its proper limits, meaning that the privilege claimed must comply with the doctrinal principles underlying SCP. Nowhere do the cases suggest that SCP is not to be interpreted restrictively.

[160] Despite how others may have described the issue, in this case I find the issue to be whether SCP extends to CIP. If the Respondents can bring CIP in relation to commercial transactions within the tenets of SCP, including by their argument that it is a defence to waiver of

SCP, they will succeed on the case without any reliance on claims that CIP is founded on the quasi-constitutional status of SCP. However, I disagree that the case law cited would support a liberal construction of SCP to expand its scope beyond what can properly be claimed.

[161] The Respondents' submission flies in the face of the rationale of SCP supporting its restrictive construction: if the benefit of the privilege is speculative, while its obstruction to justice is clear and direct, it could not be otherwise than that the privilege must be restrictively construed consistently with the logic of its principles. The correctness of these principles that represent the balancing of factors related to the administration of justice does not change due to any constitutional imperative.

[162] The Court would be very surprised if the Canadian position on the restrictive construction of SCP were to differ from that in the United States as described by Professor Giesel at pages 501-502 and footnote 106 of her article:

> The courts' acceptance of the absolute protection of the privilege along with codification by some jurisdictions indicates a collective conclusion that the privilege not only creates benefits but the benefits also exceed any cost of its application. Yet, in applying the privilege in individual cases, courts continue to concern themselves with the damage to the truth-finding mission of the judicial system. Courts often repeat a refrain that the privilege must be "strictly confined within the narrowest possible limits consistent with the logic of its principle."[106] Any desire to apply the privilege narrowly always must be considered in light of the counterweight of the general acceptance of the privilege. The United States District Court for the District of New Jersey recently addressed this tension in *Louisiana Municipal Police Employees Retirement System v. Sealed Air Corp*.:
>
> > While it is true that the attorney–client privilege is narrowly construed because it "obstructs the truth-

> finding process," the privilege is not "disfavored." Courts should be cautious in their application of the privilege mindful that "it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."
>
> […]
>
> [Footnote 106:] In *re* Grand Jury Proceedings, 604 F.2d 798, 802–03 (3d Cir. 1979); *see also* Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992) ("Because the attorney–client privilege has the effect of withholding relevant information from the factfinder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney."); *Harrisburg Auth. v. CIT Capital USA, Inc*., 716 F. Supp. 2d 380, 387 (M.D. Pa. 2010) ("'It is well established that evidentiary privileges ... are generally disfavored and should be narrowly construed.' The attorney client privilege is one such evidentiary privilege." (quoting *Pa. Dep't of Transp. v. Taylor*, 841 A.2d 108, 118 (Pa. 2004) (Nigro, J., dissenting))); *Sieger v. Zak*, 874 N.Y.S.2d 535, 537 (App. Div. 2009) (holding that the privilege "constitutes an obstacle to the truth-finding process," and it therefore "must be narrowly construed, and its application must be consistent with the purposes underlying the immunity" (citations and internal quotation marks omitted))
>
> [emphasis added, notes omitted]

[163] Obviously, when speaking to "those disclosures necessary to obtain informed legal advice" (*Louisiana Municipal Police Employees Retirement System v Sealed Air Corp*, 253 FRD 300 at 305 (D NJ 2008)), the District of New Jersey was referring to legal advice of the client's lawyer. These remarks would not extend to an allied lawyer with whom the client has no legally recognized relationship, nor information from the other client that is incorporated into the other lawyer's legal advice. That is because communications from an external source are not essential to maintain the relationship.

(5) Emerging Rationales for CIP Have No Basis

(a) *Expectation Interest*

[164] The Respondents rely upon two other rationales to support CIP. They cite jurisprudence in support of the proposition that CIP applies "where parties share a legal opinion that is in aid of the completion of a transaction; where there is an expectation that that opinion will be kept in confidence; and where completion of a transaction is of benefit to all parties." I have already noted that the *Pitney Bowes* decision made reference to expectations as a ground to support CIP where "[t]he parties would expect that the opinions would remain confidential as against outsiders" (at para 18). Being a joint client relationship however, confidentiality would be expected by SCP doctrine, not that of advisory CIP.

[165] There is no mention in the cases that purport to rely upon an expectation interest to support CIP of how such a principle would mesh with the underlying rationale of SCP. Having considered that issue, the Court can find no basis to introduce what appears to be an administrative law, or form of contract estoppel principle into the discussion of CIP or SCP.

[166] It is not realistic even to posit a mistaken expectation from the parties that the information will remain confidential. The legal conclusion must be in any event that there cannot be an expectation that the privilege will remain upon disclosure to third parties, when privilege law does not permit it. Expectations must operate within the law; they cannot override it.

[167] But even the mistaken expectation is difficult to accept. The competent lawyer would have started by advising the client not to share their communications with non-family or other related entities or else the privilege would be lost. When the opening instruction is not to share their confidences with third parties, why would the client think it could be shared with other clients or lawyers without the same result? The only basis the client could have to think the privilege remained after being told not to share their communication with third parties would be on the advice of the lawyer. If this is the case then this obviously begs the question as to the source of the expectation.

[168] In addition, one would assume that the expectation interest would have to be "reasonable", as judged by the objective, disinterested, but informed reasonable person. The foundation of knowledge needed to understand how privilege law works would have to come from the lawyer. It is no answer to argue that a legal issue as to the extent of the privilege in terms of disclosure is to be answered on a layperson's wrong understanding of the law.

[169] It is difficult to imagine that a reasonable person who is informed of the applicable principles of privilege law could possess such an expectation interest arising in the CIP context. A reasonable, well-informed observer would have the understanding that the privilege operates based on maintaining the relationship to support the administration of justice and that the advantage the client obtains is to some other party's disadvantage, if ever sued on matters relevant to the advice provided.

[170] The bottom line is that a so-called legitimate expectation in the circumstances of advisory CIP cannot override the law and is neither "expected" when told that disclosure terminates the privilege, nor "legitimate" because even if expected, to hold such a view would be unreasonable. Accordingly, the Court sees no basis for the recognition of a legitimate expectation interest supporting advisory CIP in either theory or practice and rejects the submission.

(b) *Selective Waiver*

[171] As an additional argument supporting advisory CIP, the Respondents raise the doctrine of "selective waiver" to protect their memo. Their submission is concisely restated at paragraph 2.37 of their response to the Court's second direction, as follows:

> 2.37 As noted in our prior submissions, various textbook writers (and the Court in *Pinder v. Sproule* (2003), 333 A.R. 132 (Alta. Q.B.) now believe that the doctrine of CIP is outdated and what a court should really focus on is the doctrine of "selective waiver", that is, that a party may choose to waive SCP in favour of one party without being held to have waived it against the world.

[172] The same thing has happened with respect to the new theory of selective waiver as occurred with the proposed rationales that "CIP is a defence to waiver" or is supported by an "expectation interest". When not required to adhere in any fashion to the doctrinal foundation of SCP, new theories will continue to spring up to expand the scope of reasons intended to deny the court access to relevant evidence, particularly when these theories appear to completely ignore the obstruction to the administration of justice they cause. Selective waiver can no more be reconciled with the rationale of SCP than CIP, and makes even less sense as it strays completely

from any connection with the principle of confidentiality at the heart of SCP. It too violates its fundamental precepts and is equally unfair to someone harmed by the results of the protected communications, but does so without any reference to any aspect of the rationale underlying SCP.

[173] In the Court's view, to resort to such legal theorems to justify transactional CIP being a "defence to waiver", being supported by an "expectation interest", or the unbounded concept of "selective waiver" demonstrates the degree of *ad-hoc* reasoning that has been employed to expand the scope of the obstruction to justice and unfairness to prejudiced litigants once courts abandon the doctrine and principles of SCP.

D. *Maintaining Litigation CIP while Rejecting Advisory CIP*

(1) Introduction

[174] In this section, the Court explains why it respectfully disagree with Professor Giesel's conclusion rejecting litigation CIP, while also disagreeing with the Majority in *Ambac* as to its reasons why advisory CIP should be upheld. In both cases, the Court's disagreement is based on what it concludes to be a failure to recognize that litigation CIP relies on litigation privilege, which provides a different rationale than that of advisory SCP. The distinction between the two underlying doctrinal rationales permits CIP to be an acceptable doctrine in litigation-related matters, but not in legal advisory circumstances, such as for commercial transactions.

[175] On the same premise, the Court also respectfully disagree with the Dissent in *Ambac* that opines that because SCP doctrine makes no distinction between litigation and other areas of law in its application, advisory CIP should be similarly accepted as is litigation CIP. The Dissent similarly fails to recognize the fundamental difference between litigation and advisory privilege. Once the distinction is recognized, it follows that the application of CIP in litigation matters has no bearing on its application in an advisory situation.

[176] The outcome of the distinction between the two forms of privilege is that litigation CIP is reasonably "coextensive", or "consistent" in layman's language, with litigation privilege. Conversely, advisory CIP is not reconcilable with SCP doctrine. Therefore, advisory CIP should logically and reasonably be rejected on this basis. Moreover, this conclusion is sufficient to reject advisory CIP, without the requirement to demonstrate that the costs of the privilege outweigh its alleged benefits. This conclusion flows from the rationale of SCP doctrine.

(2) Should the Court consider whether CIP be confined to the litigation context?

[177] In response to the second direction from the Court providing the parties with the Giesel article and the *Ambac* decision that confined CIP to the litigation context, the Respondents argue that because the parties were in agreement that there was no valid basis for the Court to consider the issue of confining CIP to the litigation context, the Court must limit its decision to "the issues as framed in the proceedings" (*Lipson v Canada*, 2009 SCC 1 at paras 43-44 [*Lipson*]):

> [43] My colleague Rothstein J. agrees that the impugned transactions fall afoul of the *Income Tax Act* but would nevertheless refer the reassessment back to the Minister on the ground that the Minister ought to have relied on the specific anti-

> avoidance rule in s. 74.5(11) *ITA* instead of the GAAR. In my respectful view, this approach is not open to the Court in this case. Both parties have contended from the outset and reasserted in this Court that s. 74.5(11) *ITA*, on which Rothstein J. rests his conclusion, does not apply on the facts of this case.
>
> [44] Although I agree with Rothstein J. that this Court is not bound to adopt, on a question of law, an interpretation on which the parties agree, it is quite another matter to settle their dispute on a basis of a construction and an application of the statute expressly disavowed by all parties throughout the proceedings. Our decision must turn on the issues as framed in the proceedings and litigated in the courts below and on appeal to this Court. The issue in these appeals was whether the GAAR applies to the impugned transactions.
>
> [emphasis added]

[178] I disagree with the Respondents' submission, as the circumstances herein are highly distinguishable from those in *Lipson*. First, this is not a situation where the issue was "disavowed by all parties throughout the proceedings" and only raised before the Supreme Court. The proceedings were not even terminated before the Court brought the *Ambac* decision to the parties' attention. This was done because the ratio and the discussions in *Ambac* are highly relevant and useful for this Court, and any court that might hear this matter should it be appealed.

[179] In terms of procedural fairness, the parties have been provided with the decision for the purpose of seeking their comments. It has no impact on the factual foundation of this case, relating only to the legal issues arising therefrom. The court is master of its legal domain and to a certain extent has a duty to explore all the relevant legal issues of a case in order to provide a fulsome decision to the parties and a proper foundation for consideration on appeal, as long as it does so fairly. Accordingly, the Court rejects the Respondents' submission that a court may not consider, and apply if necessary, all issues of legal interest arising out of the *Ambac* decision.

[180] It is difficult to sort out many of the principles relating to SCP where advisory CIP has been accepted without considering its application in the litigation context as opposed to an advisory context. To a certain extent the Court is required to consider the Dissent's contention in *Ambac* that SCP makes no distinction between litigation and non-litigation related matters, and therefore, that CIP is a defence to waiver, which tends to support the Respondents' position.

[181] It is evident from the Supreme Court decision of *Blank* and how litigation confidentiality operates in the adversarial context, that litigation privilege law is strikingly different from that of SCP to the point that it is irrelevant to any issue relating to the legitimacy of advisory CIP. SCP doctrine appears to have been developed entirely with advisory circumstances in mind and thus, with little regard to the confidentiality requirements in the litigation context. Consideration of the comparative situation of the two practice areas of SCP is therefore useful to understand why advisory CIP stands alone as a doctrine, related only to SCP law, and that rejecting it does not entail rejecting litigation CIP.

(3) The Rationale and Purposes of Litigation Privilege and Advisory SCP are Fundamentally Different

[182] As explained by the Supreme Court of Canada in *Blank* at para 7, litigation privilege and SCP are "distinct conceptual animals and not two branches of the same tree". While the *ratio* of *Blank* relates to whether litigation privilege is permanent or expires at the conclusion of litigation, its averments on the distinctions between litigation privilege and SCP inform the conclusions this Court reaches concerning the legitimacy of litigation CIP versus that of advisory SCP. Paragraphs 6-8 of *Blank* are first cited in this regard:

> 6 The Minister contends that the solicitor-client privilege has two "branches", one concerned with confidential communications between lawyers and their clients, the other relating to information and materials gathered or created in the litigation context. The first of these branches, as already indicated, is generally characterized as the "legal advice privilege"; the second, as the "litigation privilege".
>
> 7 Bearing in mind their different scope, purpose and rationale, it would be preferable, in my view, to recognize that we are dealing here with distinct conceptual animals and not with two branches of the same tree. Accordingly, I shall refer in these reasons to the solicitor-client privilege as if it includes only the legal advice privilege, and shall indeed use the two phrases — solicitor-client privilege and legal advice privilege — synonymously and interchangeably, except where otherwise indicated.
>
> 8 As a matter of substance and not mere terminology, the distinction between litigation privilege and the solicitor-client privilege is decisive in this case. The former, unlike the latter, is of temporary duration. It expires with the litigation of which it was born. Characterizing litigation privilege as a "branch" of the solicitor-client privilege, as the Minister would, does not envelop it in a shared cloak of permanency.
>
> [emphasis added]

[183] The Supreme Court describes, at paragraphs 24-28, the policy rationale for each privilege in respect of the legal consequences flowing from the two forms of privilege:

> 24 Thus, the Court explained in *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), and has since then reiterated, that the solicitor-client privilege has over the years evolved from a rule of evidence to a rule of substantive law. And the Court has consistently emphasized the breadth and primacy of the solicitor-client privilege: see, for example, *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.); *Smith v. Jones*, [1999] 1 S.C.R. 455 (S.C.C.); *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14 (S.C.C.); *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209, 2002 SCC 61 (S.C.C.); and *Ontario (Ministry of Correctional Services) v. Goodis*, 2006 SCC 31 (S.C.C.). In an oft-quoted passage, Major J., speaking for the Court, stated in *McClure* that

"solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance" (para. 35).

25 It is evident from the text and the context of these decisions, however, that they relate only to the legal advice privilege, or solicitor-client privilege properly so called, and not to the litigation privilege as well.

26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.

27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

28 R. J. Sharpe (now Sharpe J.A.) has explained particularly well the differences between litigation privilege and solicitor-client privilege:

> It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client

> privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.
>
> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).
>
> R.J. Sharpe, "Claiming Privilege in the Discovery Process", in *Law in Transition: Evidence*, [1984] *Special Lect. L.S.U.C.* 163, at pp. 164-65.

[emphasis added]

[184] The principal conclusion this Court draws from *Blank* is that although the case law regarding CIP does not make a distinction between litigation privilege and SCP, there are nonetheless fundamental differences in the rationales underlying the two forms of privilege. One

is to protect the adversarial process, the other to protect the solicitor-client relationship. SCP is all about the relationship. These differences legitimize the grounds for accepting litigation CIP to expand the scope of the privilege as a strategic adversarial consideration in the litigation context by providing an exception to waiver, a rationale that does not apply to advisory CIP.

[185] This distinction between what is described here as litigation and advisory CIP has also been recognized in Hubbard et al, *The Law of Evidence in Canada* (Toronto: Thomson Reuters, 2006) (loose-leaf revision 36: November 2016), at §12.240 [Hubbard et al], when commenting on the decision in *Canmore Mountain Villas Inc v Alberta (Minister of Seniors and Community Supports)*, 2009 ABQB 348 [*Canmore Mountain Villas*]. They explain that litigation CIP and the CIP exception to waiver of SCP are often confused, but are two different concepts:

> The decision of the court in *Canmore Mountain Villas Inc. v. Alberta (Minister of Seniors and Community Supports)*, underscored the potential confusion that can arise between common interest privilege and the common interest exception to privilege. The context of the case was the commencement of proceedings against a number of parties, arising from an alleged deal concluded among the plaintiff, the Province and the Town of Canmore. The Province claimed common interest privilege over documents relating to communication between the Town and the Province about the proposed deal to transfer land from the Province to the Town. Both representatives of the Town and Province had sought legal advice on this issue and referenced the work product of counsel. The court held:
>
> > The common interest privilege is not dependent on an interest shared by the parties in ongoing or anticipated litigation. Common interest privilege has broader application than that. It is not dependent upon the parties being engaged in an adversarial system and sharing a common interest. This notion was rejected by Lowry, J. in Fraser Milner Casgrain, LLP and Minister of National Revenue,

> [2002] 11 W.W.R. 682 (B.C. Supreme Court). At para. 13 and 14, the following is found:
>
> > "The respondent maintains that common interest privilege can only arise where there is a common interest in actual or anticipated litigation. The promotion of the adversary system is, it says, the only justifiable rationale."
> >
> > "I cannot accept that to be so. To my mind, the economic and social values inherent in fostering commercial transactions merit the recognition of a privilege that is not waived when documents prepared by professional advisers, for the purpose of giving legal advice, are exchanged in the course of negotiations. Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice."
>
> The court found that common interest privilege applied because communications were clearly directed to completing the transaction between the Town and the Province and the representatives confidentially discussed the transfer and took positions based on legal advice sought and given that would protect their respective interests.
>
> This description by the court sounds closer to the common interest exception to solicitor-client privilege, even though the protection was claimed in the context of litigation and was called common interest privilege. This demonstrates the confusion between the two concepts that can sometimes result.

[186] In addition, the Court is of the view that in *Canmore Mountain Villas*, the Minister properly pleaded the distinction between litigation CIP and adversary CIP based on the different underlying rationales. Having been rejected, it is assumed that the Minister chose not to advance

the same argument in this Court, no doubt because *Pitney Bowes* relied on the same rationale to reject the submission – i.e. that the economic and social values inherent in fostering commercial transactions supports advisory CIP. The Court disagrees that this rationale can support advisory CIP.

[187] The primary purpose of the confidentiality provided by litigation privilege, which is only temporary, is to protect litigation strategies in the adversarial process. Due to the strategic nature of the adversarial legal process, litigation cannot be conducted without maintaining the confidentiality of solicitor-client and other communications necessary to the adversarial process of litigation. It is very important, therefore, to stress that confidentiality is intrinsic and essential to litigation strategy which is a fundamental component of the adversarial system. Were it otherwise, it would be tantamount to showing your cards in a poker game.

[188] It is also notable that with regard to litigation privilege, in contradistinction to the rationale of SCP, the lawyer does not always want "full and frank" disclosure from the client – often just the opposite. Too fulsome disclosure could result in limiting the lawyer's ability to represent the client. For example, criminal lawyers in particular, will normally discourage unknown admissions against interest by the client. If the admissions are revealed, this could hinder the lawyer's ability to introduce evidence or make submissions contradicting the statements without being concerned about participating in a fraud on the court. I think it may be generally stated that litigation lawyers are satisfied with knowing everything they can obtain from their clients that can be ethically employed to assist them succeed in the legal proceeding.

[189] On the other hand, in terms of encouraging disclosure from the client and the self-interest in the desire to succeed in the litigation, it would only be in the rarest of situations that the client needed confidentiality to provide the litigation lawyer with every bit of helpful information that could be thought of. The confidentiality of the communications would likely have little effect in encouraging information that otherwise would not be forthcoming, if of assistance in the litigation.

(4) Communications in Anticipation of Litigation Are Distinct from Those that Anticipate Creating Litigation

[190] Many of the cases where the litigation and advisory CIP distinction arises concern discussions around "anticipated litigation". There is no difference between litigation-related circumstances when litigation has started and when seen to be reasonably anticipated or pending. The foundation is the same: it is all about protecting the strategic nature of the communications in accordance with the adversarial rules that govern the legal process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.

[191] Despite the fact that anticipated litigation is not a circumstance that officially supports advisory CIP, it nevertheless appears to be the only situation where it can be said to enable transactions. This follows from the fact that the privilege only serves any purpose when applied once litigation commences from the transaction that was the subject matter of the privilege. Indeed, it is the Court's view that the principal *raison d'être* of legal advisory CIP is in the anticipation of creating litigation because of the nature of the transaction that the privilege really

protects, i.e. transactions of questionable legality. This issue will be taken up in detail below when considering the necessity of advisory CIP in enabling transactions.

[192] This conclusion is confirmed by remarks of Respondents' Counsel from the frank discussions at the hearing when he stated as follows:

> When Abacus said we would buy your shares for such and such a price, that assumes certain tax consequences will follow and that's [what] they can base their price on. If you don't get the tax consequence the prices are the wrong price. The value that they're offering is assuming a certain tax result, so you have to have tax lawyers go through the transaction to make sure you're getting that result. That's what the memo does.
>
> The Memo, if I could put it this way, is essentially a roadmap saying we did step one, and here are the tax consequences. We are going to do step one in three days and here's what we think the tax consequences will be. We're going to do step two, here are the tax consequences. It's a roadmap to the CRA to go in and to look at it and say are we going to challenge this tax analysis or not – do we agree with this analysis or not. It's a roadmap to the CRA to come in and to tell them every way to challenge the tax result of the transaction.
>
> [emphasis added]

[193] The principal points of difference where litigation is contemplated in the two forms of CIP are those of timing and purpose. Litigation privilege initially arises only after the occurrence of facts that give rise to an anticipation of litigation. The lawyers' communications and other work are to serve a strategic purpose of better outcomes in the litigation in accordance with the dictates of the adversarial regime and in the interests of the client. Common interest communications with fellow lawyers representing other clients are for the same strategic purpose

of succeeding in the litigation. CIP and litigation privilege therefore, share the same rationales and purposes.

[194] In contradistinction to litigation privileges, advisory CIP occurs before the facts that will give rise to the litigation have occurred. Its supposed purpose is to promote transactions by confidentiality, but the real advantage of CIP occurs when it is applied a trial. In other words, the real purpose of advisory CIP in enabling transactions occurs when the parties anticipate litigation occurring as a result of the transaction that they are negotiating, such as described by Respondents' Counsel above. This purpose is purely strategic, to keep the evidence of their privileged communications out of the anticipated trial so as to improve their chance of success.

[195] This purpose is incompatible with SCP doctrine. It is to encourage disclosure to encourage compliance, which includes preventing litigation. It is not to encourage transactions that anticipate creating litigation, and thereafter afford a strategic advantage to the allied parties by keeping relevant evidence about how the transactions was negotiated out of the trial.

[196] Having made this point, I respectfully disagree with the Dissent in *Ambac* when it claims that "[n]o rational basis exists to recognize the expectations for maintaining confidences in the former (litigation CIP) but not the latter (advisory CIP)". The comment, in its context, is as follows (*Ambac* at 637):

> However, the majority fails to identify any distinction between coparties or persons who reasonably anticipate litigation, and parties committed to the completion of a merger. Both are incentivized to cooperate in order to secure a mutually beneficial outcome -- one a successful litigation outcome, the other a

> successful commercial outcome. No rational basis exists to recognize the expectations for maintaining confidences in the former but not the latter.
>
> [emphasis added]

[197] The rationale of litigation privilege, which extends to the anticipation of litigation, serves the purpose of upholding the strategic adversarial trial process, while the rationale of litigation CIP serves that same purpose. If one wishes to see them both as outcome-based given the nature of litigation, that is fine. SCP however, serves the purpose of maintaining the solicitor-client relationship, while the Dissent in *Ambac* argues that advisory CIP upholds the successful outcome of negotiating contracts. There is no rational basis in SCP doctrine that pertains to any outcome from the lawyer-client relationship that it upholds. SCP doctrine is about maintaining the solicitor-client relationship. There is no similarity whatsoever in the rational basis of SCP and that of advisory CIP based on outcomes. At best, an outcome of successful transactions would be a case by case argument that bears no relation to the rational basis of SCP.

(5) The Different Rationales of Litigation Privilege and SCP Result in Different Rationales for Whether to Recognize a CIP

[198] Unlike advisory communications, the benefits of litigation privilege to the administration of justice are neither indirect nor speculative. They are certain and direct, thereby reinforcing the adversarial process upon which our legal system if founded. This places the benefits of litigation privilege on the same scale, i.e. direct and necessary (as opposed to indirect and speculative for the disclosure benefit of SCP), as the privilege's cost by the obstruction to the production of evidence that may be relevant to the matter. In such circumstances, it is possible to assess in real

time whether the benefits approximate or surpass the costs to the obstruction to justice caused by the privilege. For litigation CIP, the strategic benefits surpass the strategic loss of evidence to the other party. In part, this is because the benefits and costs are reciprocal to each party, as they may be said to be set off against each other as they apply equally to all the parties in litigation. Both sides require confidentiality in order to be able to strategize and participate effectively in the adversarial regime.

[199] The rationale and doctrine of litigation privilege ultimately favours shared confidential communications with parties of a common strategic interest because it is seen as enhancing the strategic adversarial process as a whole.

[200] I believe this to be the implicit reasoning in *Ambac* and truly underlies the exemption it allowed for the disclosure of litigation confidences where a common legal interest exists, without terminating the privilege. For example, what the Majority reasons describe as the basis for "the exception" to waiver in litigation CIP is the necessary strategical role it plays in promoting the adversarial regime (at 628):

> As an exception to the general rule that communications made in the presence of or to a third party are not protected by the attorney-client privilege, our current formulation of the common interest doctrine is limited to situations where the benefit and the necessity of shared communications are at their highest, and the potential for misuse is minimal. Disclosure is privileged between codefendants, coplaintiffs or persons who reasonably anticipate that they will become colitigants, because such disclosures are deemed necessary to mount a common claim or defense, at a time when parties are most likely to expect discovery requests and their legal interests are sufficiently aligned that "the counsel of each [i]s in effect the counsel of all" (*ChahoonChahoon*, 62 Va at 841-842). When two or more parties are engaged in or reasonably anticipate litigation in

> which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited.
>
> [emphasis added]

(6) Revisiting *Ambac* and Professor Giesel's Article

[201] I reiterate my conclusion that the Dissent's reasons in *Ambac* are not sustainable when disagreeing with the Majority reasons upholding litigation CIP because "[s]uch requirement does not derive from the common law roots of the attorney-client privilege, which lacks any litigation requirement" (*Ambac* at 636). As the Supreme Court has found in *Blank* at paragraph 7, litigation and solicitor-client privileges are "distinct conceptual animals and not two branches of the same tree". The distinction between the acceptance of litigation CIP and rejection of advisory CIP should comply with the underlying distinctions in their privilege rationales as was argued in *Canmore Mountain Villas*. In my view, it is upon this basis that the majority should have upheld litigation CIP and rejected advisory CIP.

[202] Another area of divergence that this Court has with both the Majority and the Dissent's reasons in *Ambac* concerns the statement that SCP is "deemed essential to effective representation" [emphasis added]. For example, the Majority states as follows (*Ambac* at 623):

> The oldest among the common law evidentiary privileges, the attorney-client privilege "fosters the open dialogue between lawyer and client that is deemed essential to effective representation" (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377, 581 N.E.2d 1055, 575 N.Y.S.2d 809 [1991]).
>
> [emphasis added]

[203] As the Supreme Court in *Blank* underscores in adopting Justice Sharpe's statement on privilege, it is essential that SCP foster the solicitor-client relationship. This reflects Wigmore's Second Criterion that the "element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties" (*Wigmore* at § 2285). The distinction between it being essential to maintain the solicitor-client relationship, as opposed to essential to effective representation, seems minor at first blush. However, the point made by Professor Giesel is that it is only communications between the client and the lawyer that can be said to be essential to maintaining the relationship. Moreover, effective representation may result from various circumstances. No benefit to maintaining the relationship arises from the external legal advice of third parties, whether or not it leads to more effective representation. This point is taken up later when discussing the alleged benefits of advisory CIP.

[204] The Court's comments concerning the application of Professor Giesel's conclusions have already been voiced. While her excellent article appears to have provided the basis for reconsideration by the courts of advisory CIP, supported by a cost benefit analysis, her thesis does not apply to litigation CIP. If it does, then it must be on another basis than litigation CIP being essential to maintaining the lawyer client relationship by encouraging disclosure by the client.

[205] Accordingly, the Court concludes that the correct ground for rejecting advisory CIP is that it is not coextensive and reconcilable with SCP requirements. This being the case, by the ordinary tenets of privilege law, there should be no need to proceed with a cost-benefit analysis of advisory CIP. The disclosure of confidential information either is compatible with SCP doctrine, or not. If not, the matter stops right there. Despite this conclusion, the remainder of these reasons carry out a cost benefit analysis of advisory CIP, given the precedents of Professor Giesel and the *Ambac* decision.

VI. A Cost/Benefit Analysis of CIP

A. *Cost Benefit Analysis Cannot be Applied to Graft Advisory CIP onto the Class Privilege of SCP*

[206] SCP as a class privilege is generic in application across the entire spectrum of legal advice. Its rationale is expressed in generic terms based upon a speculative scenario that persons claiming the privilege are never required to prove, because it cannot be proved, i.e. that confidentiality encourages disclosure. SCP provides an assumed speculative benefit to the administration of justice based on a possibility that fuller disclosure will result from the confidentiality of the communications resulting in better compliance with the law and better representation. Accordingly, there is no cost-benefit analysis in the application of SCP theory, because it is not possible to conduct one. All that is required to obtain the privilege is that the communications were made for the purpose of obtaining and providing lawful legal advice. But, it is for this reason that no cost benefit analysis can be applied to support CIP, unless on a case by case methodology. It is not logical or acceptable to create an exception to SCP doctrine using principles that do not apply to SCP itself.

[207] Moreover, under SCP the client is not required to demonstrate that confidentiality provides a benefit, because it is presumed to do so, as confidentiality is essential to the maintenance of the relationship. For that reason, a claim of advisory CIP cannot rely on the same speculative presumption. CIP communications, though confidential, are not essential to maintain the relationship. That is why CIP either adheres to the principles of SCP as a class privilege, or is otherwise invalid.

[208] This may explain why no cost benefit analysis is to be found in the jurisprudence supporting CIP. It would also explain why advisory CIP has only been supported by policy factors relevant to a case by case analysis that focus on a subset of significant and legally challenging commercial transactions that better lend themselves to policy submissions.

[209] In summary, CIP is being promoted using a cost benefit analysis which is foreign and incompatible with SCP principles and how it is rationalized. The methodology is akin to a case by case approach. Moreover, when the factors in the analysis are benefits, either said to be to the administration of justice or enhancing economic and social values, the standard of proof is speculative. Such a speculative measure can only be rationalized when the benefit is essential to the maintenance of the relationship. It is the Court's view that such methodologies are tantamount to grafting a case by case analysis to a class privilege, while relying on a speculative measure that is insufficient to support advisory CIP.

B. *The Benefits of CIP to the Administration of Justice*

[210] Given the Court's understanding that any analysis related to SCP should be limited to factors affecting the administration of justice, or the legal system, the analysis of advisory CIP in this section will be confined to such factors. Accepting that external policy factors, in particular that of enabling commercial transactions are cited throughout the jurisprudence, the analysis of such factors will be carried out in the next section. The one exception relates to advisory CIP undermining the administration of justice when said to enable transactions that anticipate litigation. This is a cost to the administration of justice, as well as a detrimental policy factor that relates to transactional CIP.

(1) The benefits to the administration of justice described in *Ambac*

[211] In its reasons the Dissent decision in *Ambac* referred to the generally widespread acceptance of CIP in a non-litigation context. Furthermore, the Dissent challenged the Majority's distinction between litigation and advisory CIP on the basis that no such distinction exists in SCP. The Dissent opinion also described several benefits of advisory CIP that are relevant to the administration of justice. Principally, these relate to the encouragement of high quality disclosure to provide more effective representation leading to more compliant behaviour. The reasons also refer to avoiding disputes between allied clients concerning the completed commercial transaction and creating an expectation of privacy, on which latter subject, no more will be said.

[212] Reference to these benefits may be seen from the following passages taken from the *Ambac* Dissent's reasons (at 633, 636, 641):

Given that the attorney-client privilege has no litigation requirement and the reality that clients often seek legal advice specifically to comply with legal and regulatory mandates and avoid litigation or liability, the privilege should apply to private client-attorney communications exchanged during the course of a transformative business enterprise, in which the parties commit to collaboration and exchange of client information to obtain legal advice aimed at compliance with transaction-related statutory and regulatory mandates.

[…]

The legal demands of a highly-regulated financial business environment affect the management of information shared between client and attorney where separately represented parties work collaboratively towards a mutual goal of transforming existing business entities and relationships. Confidences shared with attorneys under an appropriate common law privilege may further compliance with legal mandates.

[…]

This application of the [common-interest] privilege functions as a narrowly crafted exception to third-party waivers in the merger context, and is justified because signatories to a pre-merger agreement are bound with a common interest in completion of the merger. In such case, the privilege would maximize the quality of disclosure necessary for accurate and competent representation leading to compliance with regulatory and legal mandates. In other words, the privilege encourages parties committed to a merger to disclose confidential information to avoid submission of incomplete or noncompliant documents.

[…]

The attorney-client privilege is a long-standing exception to the general rule promoting discovery as part of the truth-finding process, and one tolerated because it serves the individual and societal goals of furthering the proper administration of justice by encouraging the free flow of information essential to legal representation. It has never been limited to client communications involving pending or anticipated litigation. Even so, the privilege is deemed waived where a client shares information with a third party, under circumstances that reflect the client's disinterest in the continued protection of the confidences. However, where parties to a merger seek to comply with legal requirements and agree to treat as confidential any exchanges of information made for purposes of

> seeking legal and regulatory advice to complete the merger, the parties cannot be assumed to have vitiated the private nature of the information, or to harbor an unreasonable expectation of privacy in these exchanges.
>
> [emphasis added]

(2) Encouraging quality disclosure for more effective representation leading to more compliant behaviour

[213] It is acknowledged that legal advice is not confined to telling the client the law, but also includes advice "as to what should prudently and sensibly be done in the relevant legal context" (*Slansky* at para 77). However, the two tasks (stating the law, and advising how to arrange affairs to do so) must be separated somewhat for the purpose of analysing the alleged benefits of CIP.

[214] Explaining the law to a client to ensure better compliance with the law has always been the duty of the lawyer owed his or her own client alone, and not someone else's lawyer. Indeed, lawyers of allied clients are not in a solicitor-client relationship with other parties sharing a common interest and will refrain from placing themselves in a position where their advice can be relied upon by someone who is not their client. Besides, a client should not need more than her own competent law firm to advise whether the transaction in its final form, and at each step as the transaction is discussed, is compliant with the law. This remark applies for all sides of the transaction. Advisory CIP therefore provides little benefit in ensuring the client's affairs are compliant.

[215] The Court highlights the significance of a conclusion that CIP does not contribute to a client's compliance with the law. Compliance is truly the crux of the benefit to the administration

of justice from SCP. In the Dissent's reasons cited above, it is the primary factor mentioned on numerous occasions as supporting advisory CIP.

[216] The main benefit from confidentiality in working with allied lawyers is the possible encouragement of the exchange of information and advice for planning purposes. This would allow the parties to coordinate the arrangement of their affairs to maximize their returns in compliance with the law. Again, this is in line with what the Dissent in *Ambac* states. That is also the situation in this matter.

[217] There is no doubt that this result provides a benefit to the clients and therefore is considered to provide for more effective lawyering. The issue however, is the benefit to the administration of justice that accrues from this process. More precisely, why is there a need for the confidentiality of the exchanged advisory CIP information so as to benefit the administration of justice?

[218] For the confidentiality of communications to benefit the administration of justice, it must be essential to the solicitor-client relationship. This requirement is not met by information and advice obtained from a third party, such as in a CIP relationship. These communications are not essential to maintain the relationship, which will be maintained without CIP. The relationship is maintained by the confidentiality of the communications, not by disclosing it and obtaining information back from a third party.

[219] Concern has already been noted about the statement relating to the beneficial effect of SCP "encouraging the free flow of information essential to legal representation" (*Ambac* at 641) [emphasis added]. This statement was cited throughout the *Ambac* decision, mostly by the Dissent, but also by the Majority. This understates, or at least misplaces what is essential to the administration of justice for the purposes of this debate, and therefore, the issue at hand. The free flow of information must be essential to the solicitor-client relationship, not to legal representation in order to sufficiently benefit the administration of justice to justify the privilege. The free flow of information can only be essential to the relationship if the confidential communications are between the client and lawyer and not some third party or her lawyer.

[220] As noted in *Blank*, SCP concerns enabling and protecting the client lawyer relationship. CIP does nothing to protect and enable the relationship. CIP is about possibly and indirectly enhancing the relationship by obtaining external information and working with other parties to achieve better outcomes. This may result in a happy client. But so too would obtaining information from any source external to the relationship that will provide for more effective lawyering.

[221] This point becomes evident when one realizes that the advocates of CIP are attempting to rely on the same indirect speculative benefit that encourages full and frank disclosure used to rationalize SCP. They use the same speculative threshold of a possibility to support the presumed free flow of information created by advisory CIP. However, the benefits of CIP from confidentiality amongst the allied members, including those cited in *Ambac*, are similarly speculative, despite the certain and obvious way they are stated in the Dissent's reasons. The

benefits cannot be demonstrated, particularly not across the generic field of advisory CIP. In fact the speculative nature of the benefit is used by the Majority to argue that confidentiality is not necessary. CIP's alleged benefits of encouraging free flowing disclosure that would not otherwise be forthcoming without the privilege are just as speculative as those of SCP.

[222] A speculative benefit from SCP is not the same as a speculative benefit from CIP. The exchange of information in CIP circumstances is not essential to the solicitor-client relationship. The confidentiality must be essential for the maintenance of the relationship. This is what makes SCP confidentiality essential to the administration of justice. Without confidential solicitor-client relationships, the administration of justice cannot function. That is how essential it is. That is why SCP is treated in a near absolute fashion by our courts as noted by the Respondents.

[223] Moreover, the reason the benefit must be at the level of essential from the confidentiality of common interest communication is to outweigh the direct, certain and obvious cost to the administration of justice that denies its introduction at trial. But the speculative benefit provided by CIP, because it is not essential to the relationship, cannot outweigh the costs to the administration of justice. Courts are not prepared to fetter their truth-seeking legal process, unless it is clearly demonstrated that it is essential to do so. Only something as essential as the need for confidentiality in maintaining the solicitor-client relationship — without which the administration of justice cannot function — will do. The administration of justice has and will function quite nicely without advisory CIP.

[224] It also follows from the foregoing analysis that the benefit arising from CIP must be seen as largely personal to the client and obtained in consideration for a result that undermines (cost greater than the benefit) the administration of justice. The client personally benefits by trading up confidential information essential to the relationship in return for a non-essential speculative personal benefit that is to the detriment of the administration of justice because of its disproportionately greater cost to the truth-seeking legal processes.

(3) CIP Assists in Avoiding Litigation and Liability

[225] The reference in the Dissent's reasons in *Ambac* to the benefit of avoiding litigation and liability by the exchange of information between parties is intended to refer to reducing the risks of litigation between the allied clients. It is important however, not to confuse those measures that will avoid litigation between the parties with the fact that advisory CIP may encourage the free flow of information across the table for the purpose of achieving the deal. The Court agrees with the statement in *Pitney Bowes* that "[t]he sharing of legal opinions will ensure that each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way" (at para 20). It is exact that more information will avoid misunderstandings. But CIP will do little to avoid litigation with an allied party when there are concerns about abusing exchanged information, or gaining an advantage in the negotiations. These would be the more likely scenarios to give rise to litigation between the parties.

[226] Professor Giesel opined on this subject at page 540 of her article. She did so after pointing out how the lawyers would never owe a duty of loyalty towards the other clients in an

allied arrangement in reference to the American Bar Association Formal Opinion 95-395, as follows:

> At all times in the allied lawyer situation, such an attorney focuses on maximizing the ultimate outcome for his or her separate client. One can say that the attorney is acting in the best interest of all members of the joint effort, but such an attorney, at any particular point in the joint effort, is always evaluating the situation to determine whether the joint effort is in the best interest of his or her own client. When the better course is for the individual member to exit the joint effort, the lawyer will so counsel his or her client. So even in the midst of the joint effort, a lawyer for any one member of the joint effort has one eye clearly focused on the individual interests of the attorney's separate client.
>
> 2. ABA Formal Opinion 95-395: No Attorney–Client Relationship
>
> In ABA Formal Opinion 95-395, the American Bar Association's Standing Committee on Ethics and Professional Responsibility considered the nature of the relationship of an attorney and members of a joint defense consortium, an allied lawyer setting. While speculating that an attorney in an allied lawyer situation may owe members of the group fiduciary duties, the Opinion does not view the other members of the group as clients of the lawyer. Consistent with recognizing the absence of an attorney–client relationship, the Opinion clearly states that the lawyer owes no ethical duties to the members of the group other than the lawyer's separate client.
>
> [notes omitted]

[227] It is difficult to imagine any client or her lawyer relying upon the exchange of information under the umbrella of CIP, without some considerable reservation. It would not provide much comfort that other allied clients appear to have been forthcoming to the extent of avoiding litigation when one does not know what was held back, or whether the allied client was misrepresenting some important aspect of the negotiation. The traditional *caveat emptor* procedures of due diligence and similar strategies still apply if clients wish to protect disclosed

confidential communications and avoid litigation or liability concerning other parties involved in a commercial negotiation.

[228] Moreover, if the parties wish to ensure full disclosure, such as might avoid future litigation between them, this could be achieved by retaining a single lawyer to represent all the parties. The lawyer would be subject to a duty of loyalty to ensure the full and equal sharing of key information underlying the common interest, such that there would truly be a fulsome disclosure to head off future internecine disputes. Otherwise, the reality is that all of the lawyers representing the different clients in an allied client situation have a first duty to represent the interests of their own client, over those of the other clients.

[229] The Court is of the view that the exaggeration of CIP's role in avoiding litigation between the parties has been exacerbated by its confusion in jurisprudence with JCP. CIP has been credited with the benefit of minimizing litigation between the parties, when that is more a result that JCP has delivered.

[230] There exist other means to limit litigation between negotiating parties who exchange confidential information, such as by a non-disclosure agreements ("NDA"). These are common-place in commercial law and will be upheld by the courts. The courts will also accept most other reasonable requests to protect confidential commercial information during litigation. Similarly, concerns about the risks of future litigation due to a party not obtaining full or accurate information during negotiations is usually provided for by appropriately drafted due diligence

agreements. In addition, there are various legal protections against most forms of misrepresentation available under the common law and statutes.

(4) Systemic Benefits of CIP

[231] Although not referred to in *Ambac*, Professor Giesel considers arguments that have been advanced elsewhere suggesting that there are systemic benefits resulting from CIP. She concludes that such benefits are highly speculative, as seen from this passage at page 548:

> While it is possible that applying the privilege to the allied lawyer setting creates efficiencies in representation, it is also very possible that recognition of the privilege in this setting does no such thing. When parties join together in a common effort but with separate lawyers, it is true that the attorneys can divide up the needed work on the matter; not every client must pay to have its separate attorney complete every step. But work on a legal matter is not finite. More lawyers may mean that more work is done. The lawyers may not divide the work. Even if work is divided, each lawyer must remain wary and cautious, and must take on a monitoring function regarding the work done by lawyers for the other members of the joint endeavor. One cannot say that each client pays less or that each lawyer bills fewer hours in an allied lawyer context than when parties and counsel act separately.
>
> [notes omitted]

[232] The Court's view is that the more lawyers are involved, the more costs will likely increase. It is simply a factor of communication paths between lawyers that increase exponentially by the number of lawyers participating in these communications, all of which has to be paid for by the clients. It is also the Court's experience that more lawyers at trial tends to increase the costs of the process with little apparent benefit, as it does for the clients.

C. *Costs of CIP to the Administration of Justice*

(1) An Expansion of the Quantity of Privileged Communications

[233] Prior to the relatively recent growth CIP, the client to client or lawyer-to-lawyer communications between negotiating parties were not subject to a claim of SCP (as opposed to litigation or settlement privilege that rests on different foundations). If clients negotiated transactions with the help of lawyers, their communications with their own lawyers were privileged, but third party communications, including those with other lawyers, were not kept out of court proceedings. What this meant was that negotiations concerning the resulting transactions were transparent in future litigation processes. The courts knew not only what the commercial transactions were, but also how they came into being and how the parties understood they were intended to operate. Contrast that with this matter, where all the Minister has to work with is the multiple transactions themselves.

[234] Moreover, access to this relevant evidence is disappearing quickly. Reference has already been made to Professor Giesel's comments that there has been "a broad expansion of the character of communications not presentable to the truth-finder and a substantial increase in the quantity of communications not subject to disclosure and not available to the truth-finder" (at 544). She backs up this claim with data. She has quantitatively demonstrated that there has been a marked increase in the development of a privilege that barely existed before the 1980s, to one that is now commonplace and expanding in the United States and Canada.

[235] There is no rationale that would confine CIP to commercial transactions, despite intimations to the opposite effect by the dissenting judges in *Ambac* who focus on significant transformative transactions that allegedly require CIP to be concluded. Its principles will apply whenever parties find some common legal interest they wish to pursue where the parties share an interest in concluding the transaction. Advisory CIP is only now beginning to come of age. As was noted by the Majority in *Ambac*, "one treatise has observed that the common interest exception in these jurisdictions "is spreading like crabgrass to areas the drafters of the Rejected Rule could have hardly imagined" (Wright & Graham at paragraph 5493 [2015 Supp])" (at 632). This is to be expected, given the generally inventive spirit of lawyers. Once thoroughly ensconced in privilege law, it appears likely that when lawyers communicate on any subject where their clients are seeking some common goal, the privilege will be raised by connecting it to a legal interest.

[236] The Ontario Superior Court in the matter of *Trillium* at paragraph 14, where the Court adopted the Master's conclusion that the CIP exception is "so fact driven, there can be no hard and fast rule as to when it will or will not arise". *Trillium* demonstrates that the new privilege can be expected to have wide application in Canada and pose challenging decisions for the courts as they assess the application of CIP to different fact situations.

[237] It should not be forgotten that the Respondents allege that the benefit of CIP is to generate the "free flow of information" to enable the formation of commercial transactions. By their own admission therefore, one can anticipate a substantial increase in the scope of privileged information protected by CIP.

[238] Nor can any comfort be drawn from the fact that only legal communications will be privileged. As in this matter, the excluded evidence would describe how the commercial transactions were negotiated. While not yet raised in this case, given the decision to limit the application of the Memo, it could of course include the communications of other professionals or persons retained by the lawyers to assist them and in rendering their legal advice, such as the accountants "crunching the numbers". Most of the cases in the area appear to be highly complex, as in merger discussions or large commercial sale transactions involving thousands of documents on which privilege is claimed. There are other privilege claims pending in this matter. If CIP is upheld as a legitimate doctrine of SCP, other documentation will likely be the subject of a similar claim of privilege.

(2) CIP Denies the Courts Important Relevant Substantive Evidence

[239] The evidence of communications between the parties is often essential to finding facts concerning the commercial transaction, particularly when motivations and intentions are at issue. In a world where understanding what a transaction between the parties truly intended to achieve and where the spirit of the law and Parliament's intent are often more important than the deeds or words describing them, the courts require access to the relevant evidence about the transaction that the parties communicated to each other. How the commercial transaction was concluded is important, relevant, and substantive evidence that could have a determinative impact on the outcome of any challenge to the transaction. This is precisely the Court's principal problem with this case in denying the trial court highly probative evidence about how the transactions were concluded.

[240] The extent of the impact of the denial of important, relevant and substantive evidence to the courts is underscored by the different results attained by applying litigation CIP and advisory CIP. When advisory CIP is applied at trial, the court is denied the exchanged solicitor-client communications and all the associated information that travels with it in relation to the subject matter of the dispute. This distinguishes the cost of advisory CIP to the administration of justice in comparison with that arising from the disclosure of communications protected by litigation privilege. Much of its content relates to the conduct and strategy in the adversarial process, which by rules of litigation the parties are entitled to keep confidential and vanishes after trial.

[241] The Court recognizes that a denial of relevant evidence at trial is also the essence of SCP. But the situation regarding CIP is dissimilar. SCP privilege is essential to the maintenance of the solicitor-client relationship. CIP communications may enable the formation of the contract and provide benefit to the client, but that does not make them essential for the purposes of the administration of justice. Also, one client cannot create a transaction that is the subject matter of the litigation that adversely affects a third party. The fact that the third party is the State representing the collective interests of society does not change the situation. The risk of a serious injustice to the party alleging prejudice from the transaction concluded under the confidentiality of advisory CIP is obvious when courts are denied relevant evidence on substantive aspects of the transaction that are not protected by SCP.

[242] In conclusion, the courts should not delude themselves into thinking that allied lawyer privilege is a minor change in the world of SCP. It has already been demonstrated that it represents a veritable sea of change with an exponential expansion in the number and type of

situations seen in the past two or three decades. This comes at a significant cost through the loss of highly probative evidence with no discernable benefit to the administration of justice.

(3) Advisory CIP Provides a Privilege Not Available to Most Users of Advisory Legal Services

[243] The benefits of SCP are available to all users of legal advisory services. This is not the case for the users of advisory CIP who protect their shared legal communications relating to a common interest. They have the advantage of regular SCP, as well as the additional benefits of advisory CIP. This benefit is not available to other clients who do not conclude commercial transactions, or require other collaborative advisory advice in relation to a common legal interest.

[244] Advisory CIP thus favours a very small subset of the wide population of SCP users. This places the clients benefiting from advisory CIP in an advantageous position relative to other users of advisory legal services. In other words, this result is in conflict with the generic nature and equal access of all legal users of SCP. Particularly, it does not seem fair that one small subset of SCP users should have an advantage at trial because their particular circumstances allow them to benefit from a form of privilege not available to the overwhelming majority of advisory legal services users who will be disadvantaged by the privilege. There appears to be no rationale based on the administration of justice explaining why the courts should provide a small subset of the total population of SCP users with an additional privilege in litigation that is not available to other SCP users.

[245] This result simply fortifies the Court's conclusion that exceptions to SCP doctrine cannot be made based upon the circumstances relating to how the legal advice is used, shared, or the outcome it produces. To do so places CIP users in an unfair advantageous position at trial. It enables them to use the shared legal advice to participate in secret conduct that prejudices other SCP users of legal advisory services who do not enjoy any reciprocal or similar privilege advantage.

(4) Potential for Abuse of CIP

[246] In *Ambac*, the Majority acknowledged that there was no evidence of actual abuse in the case before it, or in jurisdictions that have done away with a litigation requirement. It nevertheless concluded that the potential for abuse is sufficient to be considered a factor to deny CIP in the non-litigation environment.

[247] Its reasoning was twofold. First, it concluded that the difficulty in defining "common legal interests" outside the context of litigation could result in the loss of evidence of a wide range of communications between parties who assert common legal interests, but who really have only non-legal or exclusively business interests to protect, i.e. over claiming. This conclusion was supported by reference to an article by James M Fischer, "The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain" (1997) 16 Rev Litigation 631 at 642. Furthermore, Professor Giesel makes the same point by providing examples at pages 551-53 of her article to support her conclusion that "[t]he common interest requirement is simply too malleable on a case by case basis to provide any certainty with regard to its application" (Giesel at 553).

[248] Second, the Majority referenced what I would describe as a high-pressure and high self-interest argument with respect to lawyers' role in limiting abuse. It quoted one commentator who had observed that "[t]he greatest push to expand the common interest privilege comes from corporate attorneys representing multiple clients, often in an antitrust context" and that it is in precisely this context "that the potential for abuse is greatest" (Edna S Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, 5th ed (American Bar Association, 2007) at 277 [Epstein], cited in *Ambac* at 630).

[249] The Dissent disagreed with these opinions, noting that they were speculative and that no reason had been offered as to why any abuse of the privilege cannot be addressed through the legal system's existing methods for preventing and sanctioning it.

[250] It is difficult in some respects to disagree with the Dissent's position as it is difficult to prove abuse in respect of a generalized situation without venturing too far into speculation. However, much of SCP theory is founded on presumptions bearing little supporting evidence, while the potential of abuse is the kind of issue that can actually be considered based on reasonable inferences of self-interested human behaviour. There is some foundation for inferences of abuse, such that I am in agreement with the Majority reasons in *Ambac* that there is greater scope for abuse occurring when applying CIP than were the privilege to be rejected.

[251] First, in relation to those potential abuses said to arise when claiming the privilege, evidence from years of shared experience of judges and litigators would confirm that over-claiming is already a not-uncommon practice in the field of traditional SCP. It occurs on the

premise that when in doubt “there is no harm in trying”, while there is little in the way of meaningful deterrence.

[252] Moreover, it is a practice that often is successful because it is not challenged for various reasons, including time, cost and strategic concerns. When challenged, it may result in a significant reduction in the number of documents on which privilege is claimed, usually after the motion is launched, but before it is heard, thus mitigating the costs deterrent.

[253] The potential for abusive claims is compounded for CIP by the fact that the privilege raises challenging issues of mixed fact and law, such as in the area of complex commercial transactions. The parties and the courts face the issue of both defining the common interest and all the terms governing it, along with sorting out legal from business communications exchanged by multiple parties and their clients. Just reading some of the decisions such as *Duplan* and *Bank Brussels Lambart* will demonstrate the complexity and fine distinctions that apply to advisory CIP.

[254] These types of situations portend much more complex motions and appeals then the garden-variety type where traditional SCP claims are advanced. If nothing else, these issues entail considerable extra legal costs to the parties, while adding to the burden of the courts.

[255] It is for these reasons that the Court respectfully disagrees with the Dissent’s view that courts are fully equipped to take on the challenge posed by CIP, although they have no choice but to deal with them. This task is more complex than what the Dissent in *Ambac* described as

"separat[ing] privileged communications from non-privileged" (at 638). SCP is a generally bright-line, relatively straight-forward legal rule that facilitates its application and consideration. CIP poses decisional challenges that do not exist in SCP.

[256] Because of the uncertainty and complexity of issues involving CIP, the privilege also provides a procedural avenue for abuse by allied client defendants in fighting off challenges to their transaction. Generally anything that adds to the procedural complexity of the matter can be used as a "many-cuts" type of strategy by well-endowed litigants to delay and increase the costs of litigation to the most ardent plaintiffs. Where significant commercial results are in play, litigation may take on a "no holds barred" approach, where the small points are often litigated into the appeal courts. This could favour defendants over plaintiffs in achieving better settlements on the wearing down strategy.

[257] With respect to "client pressure" abuse, the Majority in *Ambac* is correct when it intimates that there are client pressures in the area of "mega-transactions" where these issues appear to most often arise in advisory CIP cases, such as the merger and acquisition situations referred to by the Majority.

[258] It is a reasonable inference that commercial law lawyers, in an environment of significant high-value transactions, may face requests from powerful strong willed business clients to employ the privilege where not entirely appropriate. This is compounded by the fact that providing a cloak of secrecy over negotiation communications is invaluable to the practice of

commercial law as an advantage to have lawyers lead on the negotiation of CIP based transactions by cloaking much of the negotiations, as was the situation in this matter.

[259] Consequently, the pressures on law firms who claim to be able to keep commercial negotiations secret, or who are facing clients who may be pushing the envelope on CIP claims raise a serious potential for abuse. If refusing to comply with the client requests means that the client is unhappy, or may lead to the work going off to one the client's other law firms, or the firm next door, the pressure to accommodate may be extremely high.

[260] Even in a situation where there is less pressure from the client, as noted, the fact is that most legal opinions involve a range of possible outcomes such that a lawyer can reasonably opine that the courts will have to decide whether the privilege applies. When one opinion is favoured by the client, it may be accommodated, even if not as solid as a more conservative claim of privilege than otherwise would be recommended by the lawyer.

[261] It is in this context that transparency remains the optimal solution to ensuring that abuse is minimized in the negotiation of commercial transactions. It is generally accepted that transparency, brought to any kind of situation where there is a potential for abuse, is an appropriate response to assist in deterring the misconduct, where no other form of deterrence exists, or is effective.

[262] In conclusion, it is likely that CIP, by its complexity and its limits on the transparency of commercial transaction negotiations, in addition to the environment that this privilege often

operates in, would present an augmented potential for abuse occurring in its application and thereby an additional cost to the administration of justice beyond that occurring from ordinary use of SCP.

(5) Advisory CIP is a Cost to the Administration of Justice By Enabling Commercial Transactions that Anticipate Litigation

[263] The Court has already touched on the fact that advisory CIP enables transactions that anticipate litigation with the conclusion that this undermines the administration of justice. While a subject matter that relates to the cost benefit analysis of CIP based on the factors of the administration of justice, it could be considered under in this part. I nevertheless conclude that it is better reviewed as an external policy factor in the section that follows.

D. *External Social Policies*

[264] The Court is required to consider the Respondents' argument according to which the "economic and social values inherent in fostering commercial transactions" merit the recognition of a CIP (*Fraser Milner Casgrain*, cited in *Pitney Bowes* at para 17). They claim that the values inherent in enabling commercial transactions have been recognized extensively in Canadian and other common law jurisdictions to support advisory CIP.

[265] The issues considered under this section include: 1) whether external social policies are relevant to the issue of CIP; 2) the standard of proof required to establish a beneficial social policy supporting CIP; 3) whether the evidence said to establish that CIP is necessary to foster

commercial transactions is speculative; 4) whether CIP undermines the administration of justice because it mostly enables commercial transactions that anticipate litigation; and 5) whether the type of commercial transactions enabled by CIP provide value or challenges to society.

(1) Policy Factors are Irrelevant to CIP

[266] There appears to be no decision in which a court has questioned whether economic and social policies are relevant to issues of SCP and advisory CIP. In the Court's view, such external policy factors, i.e. that do not pertain to the administration of justice, are irrelevant for the following reasons.

[267] First, SCP is founded exclusively on factors that relate to the administration of justice. The narrow benefit of SCP pertains to the privilege supporting the solicitor-client relationship as an essential constituent of the administration of justice. The countervailing cost of the privilege is similarly narrowly expressed in terms of the obstruction the privilege causes the administration of justice by preventing the introduction of relevant evidence at trial.

[268] Second, by the distinction that SCP is a class privilege, its requirements are limited to establishing legally related lawful communications between the client and lawyer for the privilege to be *prima facie* acknowledged. There is no scope for the introduction of other considerations with respect to issues such as the termination of waiver of a SCP. If other factors not related to the administration of justice are brought to bear, the courts require the privilege to be established on a case-by-case basis, where external policy factors may be relevant, but are judged against a different standard and set of factors.

[269] Third, because SCP is a class privilege its application is generic across the field of legal advice. There is no scope within its four corners to make exceptions based upon the purpose, use, or outcome of its application, unless raising a particular concern with respect to the administration of justice. External economic and social policies would not fall into that category.

[270] Fourth, a social policy analysis of SCP could create an unresolvable conflict with an analysis based upon the factors relevant to the administration of justice. Obviously, if policy factors are relevant, so too would be those relating to the administration of justice. If the weighing of the latter factors established that the costs of advisory CIP were greater than the benefits, then the issue would become whether policy factors should outweigh those of the administration of justice. This would present an untenable result for SCP policy, and would not be countenanced for all of three obstacles to such an analysis described above.

[271] Accordingly, the Court concludes that policy factors are irrelevant to any aspect of SCP, including whether to recognize advisory CIP as a legitimate constituent of its doctrine. It follows therefore, the conclusions stated in the "plethora of case law" that cite economic and social values as a foundation for the recognition of advisory CIP are based on an irrelevant consideration.

(2) The social policy benefits of CIP must be proven on a balance of probabilities

[272] As noted by Wigmore, the benefit to the administration of justice of SCP need only be indirect and speculative. Should the same standard apply to the alleged benefits of CIP, or should

it be on the higher standard of a likelihood or probability? Three points seem relevant to this debate.

[273] First, as mentioned, this is not a discussion about CIP's benefits to the administration of justice, a subject matter about which the courts are inherently knowledgeable as it relates to the fundamental principles within their domain. Most external social policies are another kettle of fish in the sense that courts need evidence, preferably direct, but at least of a strong inferential foundation, to establish as a fact that there is some benefit to society relating to external social economic policies and that the confidentiality of exchanged legal advice on matters of common interest plays a role in promoting these benefits.

[274] Second, although the standard of proof of the benefit under SCP doctrine is only that of a possibility, or speculation, it is rationalized on the basis that the confidentiality of these communications is considered essential to the maintenance of the solicitor-client relationship. Issues pertaining to economic and social values share no similarity with those of SCP, besides which advisory CIP is not founded upon the maintenance of a solicitor-client relationship. The standard of proof of the benefit of the economic or social values pertaining to advisory CIP should not therefore, be so low as that of a possibility.

[275] Third, insofar as the Respondents are relying upon an external social policy, I see no reason why the principle in *R v Gruenke*, [1991] 3 SCR 263 at 289-291 [*Gruenke*], setting out a rigorous standard of proof for the establishment of new categories of privileged communications

based on external social policies, should not apply. This principle requires the demonstration of an external social policy of such unequivocal importance that it demands protection (*ibid* at 296):

> The categories of privileged communications are, however, very limited -- highly probative and reliable evidence is not excluded from scrutiny without compelling reasons. In Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), the authors remark at p. 157:
>
> > The extension of the doctrine of privilege consequentially obstructs the truth-finding process, and, accordingly, the law has been reluctant to proliferate the areas of privilege unless an external social policy is demonstrated to be of such unequivocal importance that it demands protection.
>
> [emphasis added]

[276] Accordingly, the Court concludes that the Respondents must prove as a probability or likelihood that the confidentiality of the CIP communications is necessary to enable commercial transactions, as well as that commercial transactions said to be enabled by CIP are of unequivocal importance to society.

(3) The evidence supporting that CIP is necessary to foster commercial transactions is speculative at best

[277] The Majority in *Ambac* relied upon the absence of necessity to reject the alleged benefit of CIP. The judges concluded that because "no evidence has been presented here that privileged communication-sharing outside the context of litigation is necessary to achieve those objectives", they were not sustainable (at 628). The Majority found no evidence that mergers, licensing agreements and other complex commercial transactions were not occurring in New York or that

there was evidence that corporate clients had ceased complying with the law because of the absence of CIP. This conclusion also appears to be empirically sustained by the innumerable commercial transactions concluded over the last century involving common interests of clients before advisory CIP came into vogue.

[278] The Respondents dispute the Majority reasoning that these issues are matters of "evidence" in the socio-economic sense in which the Majority uses the term and that it is not necessary to provide evidence that confining CIP to the litigation context would have a detrimental effect on commercial transactions. The Court repeats its view that socio-economic conclusions relating to a policy issue, if relevant at all, require evidence to be established as a fact.

[279] Despite the Respondent's views on the lack of necessity for evidence, they argue that the Court should rely upon the affidavits filed by Messrs. Donor and Kirby, which state that not applying CIP would inhibit the progress of their transaction. Mr. Kirby deposed that if he had known that a third party such as the CRA could obtain the memorandum or other material that was discussed during the course of the transaction, then it would have been impossible to complete the transaction. He was not cross-examined on this statement.

[280] Little weight may be attributed to these affidavits. The validity of CIP is not to be determined by the specific situations that come before the Court, as this would be an even further narrowing the field of SCP application. To accept this approach to the application of CIP would truly make it case to case, but taken down to the level of the specific case before the court.

[281] Moreover, would not have been necessary or possible to cross-examine the deponents on this evidence, inasmuch as the Respondents would not have disclosed the memorandum or pointed out which parts of it would be of such significance to prevent a transaction which would generate significant tax savings.

[282] The parties were requested in the Court's second direction to provide any empirical data or evidence that would support the contention that CIP has the effect of encouraging the formation of commercial contracts. None was furnished.

[283] Counsel were also asked whether the conclusion that not applying CIP would inhibit the progress of the formation of commercial contracts was a conclusion on which the Court could take judicial notice. The Respondents did not attempt to persuade the Court that the fact that the absence of CIP would discourage the formation of commercial transactions was of such notorious knowledge that it could be taken as a matter of established fact.

[284] As far as the Court is able to determine, the conclusion that CIP promotes the formation of commercial contracts in the jurisprudence cited in support of this proposition, represents the unsupported opinions of judges. As a practical matter, it does occur that judges' factual conclusions are accepted as a form of common-knowledge-inference based on human conduct without any requirement for substantiation. But with respect, the unsupported opinions of judges are an insufficient foundation for a significant new legal doctrine such as expanding SCP to include CIP. Similarly, the opinions of judges would not meet the requirement of establishing as a fact that CIP encourages parties to form contracts that would not occur absent the privilege.

(4) Advisory CIP Undermines the Administration of Justice by Enabling Commercial Transactions that Anticipate Litigation

[285] In this section, the Court outlines its reasoning that advisory CIP undermines the administration of justice, because it mostly enables transactions that anticipate creating litigation. This point was adverted to earlier when conducting the cost benefit analysis of CIP's impact on the administration of justice as measured against the factors in SCP doctrine. It is more appropriate to consider the topic as a policy factor. The issue did not fit well with an analysis based strictly on CIP's relation to SCP factors. As well, the downside effects of contracts anticipating creating litigation only arise when challenging the policy argument that CIP is necessary to foster commercial transactions. Nevertheless, the issue straddles both forms of cost benefit analysis, such that the remarks that follow are relevant to a cost benefit analysis based on the administration of justice, and should be considered under that heading as well.

[286] The Majority in *Ambac* concluded that advisory CIP was not necessary to enable commercial transactions except for those that anticipated litigation. In doing so, the Majority quoted the following passage from Melanie B Leslie, "The Costs of Confidentiality and the Purpose of Privilege" (2000) Wis L Rev 31 at 68 (cited in *Ambac* at 629):

> when parties share attorney-client communication for planning purposes outside of the specter of anticipated litigation, such as when parties cooperate to strengthen or obtain patent protection ... it is more likely that [they] would have shared information even absent the privilege.

[287] This conclusion is logical and, moreover, describes a result that undermines the administration of justice. This conclusion is based on a number of contributing factors. First, the critical issue in these cases is whether confidentiality is necessary to generate more disclosure and advice than would be forthcoming without the privilege, thereby facilitating the negotiations leading to the transaction. Second, transactions where the parties act cooperatively require the free flow of information in order to coordinate the arrangement of their affairs; but this requirement exists regardless of any privilege. Third, CIP is only activated during trial when a party claims to be prejudiced in some manner that entails challenging the deal SCP is said to have enabled. It is at this time that the privilege plays its role to prevent disclosure of relevant communications concerning how the transaction was enabled.

[288] If the transaction raises no issues of its lawfulness, and projects reasonable economic returns, this should be incentive enough to encourage the sufficient exchange of information for the deal to close. Even for transactions where litigation is anticipated, but the returns are significant, a risk analysis may support proceeding with the deal despite the headwinds of litigation. By deduction, CIP most often would serve the purpose of fostering those commercial transactions where it is anticipated that the deal is at high risk of generating litigation and the legal discussions, if disclosed, may prejudice the litigation. Otherwise, CIP is not necessary.

[289] If advisory CIP mostly enables commercial transactions that anticipate litigation, then it undermines the administration of justice. First, CIP promotes litigation by the nature of the high risk transaction that it enables that would not have been concluded, but for the privilege. High litigation risk transactions are more likely to result in litigation. Second, and simultaneously to

enabling high litigation risk transactions, CIP protects the very communications that might demonstrate the unlawfulness of the transaction it enabled. In other words, CIP is enabling high risk litigation that creates an economic profit for the clients, while helping fend off any future challenge to how the profits were earned by keeping out evidence that would expose the legal deficiencies of the deal.

[290] Finally, in respect of encouraging compliance with the law, as CIP is only relevant where litigation is anticipated and where CIP offers the allied parties a strategic advantage, CIP would tend to foster less compliance with the law. It does so by assisting allied parties succeed in a potentially losing case by relying on the privilege to conceal the deficiencies of the transaction. Such may be the situation in this matter, if CIP is held to be a valid component of SCP law.

(5) Many commercial transactions said to be enabled by CIP provide no value but contribute to the challenges facing societies

[291] It is not disputed that society benefits from some commercial transactions. This is implicitly recognized as members of society enjoy the fruit of many of these transactions in nearly everything they do and how they live in modern society. As pointed out though, only commercial transactions that anticipate litigation or require the privilege to enable the transaction need CIP, making this issue irrelevant to most commercial transaction that are concluded. In addition, the positive views on the economic and social interests that are said to be inherent in CIP, would diminish if it is recognized that the nature of many of the transactions provide no, or questionable economic or social benefit to society.

[292] The CRA believes that the transactions the parties and their corporate entities arranged under the cloak of legal secrecy so as to avoid paying significant taxes are abusive. Abusive tax avoidance schemes are a significant category of transactions that greatly benefit from CIP, yet do not provide any meaningful economic or social benefit to society.

[293] "Transformative" commercial transactions involving mergers and acquisitions of corporations or their assets also raise highly controversial issues about their societal benefits. The Court can take judicial notice of the fact that the horizontal or vertical concentration of production and services are thought by economists to harmfully augment monopolistic and oligarchical economic structures contributing to other socially harmful interests.

[294] CIP will also enable commercial transactions that are of questionable legality given the purposes they are put to. Examples abound. They may involve placing wealth off shore, or estate planning of wealthy persons, or multinational corporations shifting their costs to high-tax countries and their profits to low-tax countries. The transactions require the employment of lawyers in several countries or legal jurisdictions who excel at navigating the complexity and opacity of their legal world or of international treaties and arcane points of law that abound there. The schemes may resort to shell corporations, offshore trusts, and other legal constructs such as bankruptcies or cross-border protections that require secrecy of their advisory communications in order to be concluded. Like this matter, there is little or no economic reality to these transactions, nor any benefit to society. Each time there are exchanges of legal advice between the lawyers there will be cause to find a common legal interest of concluding the transaction with the result

that the legal advisory communications and all of the accompanying expert and related evidence will be privileged.

[295] The scope of what may be included as a beneficial commercial transaction is simply too broad to serve any judgemental purpose on policy. There are many areas where the commercial transactions relying on the protections of advisory CIP serve little or no benefit, or even could be said to be harmful in the outcomes they exact on society. The point is that commercial transactions import whatever societal value the parties negotiating them bring to the table.

[296] The Court's view is that there is no reasonable sustainable policy ground to support the type of transaction that can only be negotiated if granted an advantage at a trial of hiding the transactions negotiations when its lawfulness is challenged. If the transaction needs an upper hand in the adversarial arena to be concluded, it is more than likely provides no benefit, or turns out to be detrimental to society's interests. This is in addition to being unfair to the litigant in court who seeks redress for the prejudice wrought by the transaction.

[297] In summary, the Court concludes that there is little or no reliable evidence that advisory CIP is supported by the economic and social values of the commercial transactions it is said to foster. Most commercial transactions would be concluded without the requirement of CIP based on traditional profit motives that have always motivated their formation. Those that do require the privilege are transactions that present a high risk of anticipated litigation, where the application of CIP undermines the administration of justice in the area of commercial transactions, tending towards less compliance with the law. Many of the cases described in the

jurisprudence where a CIP is advanced involve commercial transactions of no, or even detrimental value to society. In any event, the only evidence on the effect of CIP, apart from the opinions of judges, demonstrates that the absence of a CIP has had no impact on the conclusion of commercial transactions or any failure to comply with the law.

VII. Conclusion

[298] Advisory CIP is not a valid constituent form of SCP and therefore has no application to the facts of this case for the following reasons:

1. Advisory CIP was incorrectly accepted in both the United States and Canada based upon a misapprehension that it was supported by similar rationales and purposes said to support JCP and litigation privilege, when they bear no relation to advisory CIP.

2. JCP is a valid form of SCP, while CIP is not.

3. Litigation CIP is compatible with litigation privilege based on a shared adversarial purpose. However, litigation privilege is distinct from SCP. The primary function of SCP is to maintain the solicitor-client relationship without which the administration of justice cannot function. It is not rationalized as serving any adversarial purpose. For that reason neither ligation privilege nor litigation CIP shares any functional compatibility with advisory CIP.

4. Not only does advisory CIP not conform to the fundamental tenets of SCP, it is incompatible with them. Indeed, its application guts SCP of its purpose and function. The *ad hoc* rationales said to justify advisory CIP, such as it being an exception or defence to waiver, a form of selective waiver, or supported by an

expectation of confidentiality, must be rejected because they eviscerate SCP of its purpose and function.

5. Advisory CIP provides no benefit to the administration of justice in either enhancing compliance or maintaining the solicitor-client relationship, while significantly adding to its costs. Advisory CIP significantly expands the quantity of relevant evidence that is denied to the courts. It is not available to most users of advisory legal services and unfairly disadvantages them at trial. Furthermore, it provides an increased potential for abuse, while undermining the administration of justice by predominantly enabling transactions that anticipate creating litigation.

6. External policy factors relating to the use of SCP, such as advisory CIP providing economic and social benefits to society by fostering commercial transactions are incompatible with SCP, which is limited to factors affecting the administration of justice.

7. Resort to external policies represents an attempted case-by-case justification of a SCP which is incompatible with the class of SCP. Advisory CIP as a case-by-case justification of privilege requires the demonstration on a balance of probabilities to be of such unequivocal importance to society that it demands protection.

8. The claimed policy benefit of advisory CIP of enabling commercial transactions is entirely speculative, and more likely represents a cost to society by the fact that advisory CIP mostly enables transactions that anticipate litigation which undermine the administration of justice, or are otherwise of no, or harmful value to society.

9. The prior jurisprudence of the Federal Court of Canada, namely the *Pitney Bowes* decision, is not binding on this Court. *Pitney Bowes* is distinguishable as it was a matter involving joint client representation, not allied lawyer CIP. The Court in *Pitney Bowes* also applied unsound jurisprudence from other Canadian and American courts that relied on the false external policy factor of advisory CIP

> fostering commercial transactions and unsupportable expectations of confidentiality.

[299] Accordingly, the application is allowed. The Respondents are required to produce the Abacus Memo pursuant to subsection 231.2(1) of the ITA.

[300] No costs are awarded. The Court rejects the Applicant's submissions that the Memo was business advice, concluding instead that advisory CIP is not a legitimate or acceptable application of solicitor-client privilege.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed. The Respondents are required to produce the Abacus Memo pursuant to subsection 231.2(1) of the ITA. No costs are awarded.

"Peter Annis"
Judge

ANNEX

Requirement to provide documents or information	**Production de documents ou fourniture de renseignements**
231.2 (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act (including the collection of any amount payable under this Act by any person), of a listed international agreement or, for greater certainty, of a tax treaty with another country, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,	231.2 (1) Malgré les autres dispositions de la présente loi, le ministre peut, sous réserve du paragraphe (2) et, pour l'application ou l'exécution de la présente loi (y compris la perception d'un montant payable par une personne en vertu de la présente loi), d'un accord international désigné ou d'un traité fiscal conclu avec un autre pays, par avis signifié à personne ou envoyé par courrier recommandé ou certifié, exiger d'une personne, dans le délai raisonnable que précise l'avis :
(a) any information or additional information, including a return of income or a supplementary return; or	**a)** qu'elle fournisse tout renseignement ou tout renseignement supplémentaire, y compris une déclaration de revenu ou une déclaration supplémentaire;
(b) any document.	**b)** qu'elle produise des documents.
Unnamed persons	**Personnes non désignées nommément**
(2) The Minister shall not impose on any person (in this section referred to as a "third party") a requirement under subsection 231.2(1) to provide information or any document relating to one or more unnamed persons unless the Minister first obtains the	**(2)** Le ministre ne peut exiger de quiconque — appelé « tiers » au présent article — la fourniture de renseignements ou production de documents prévue au paragraphe (1) concernant une ou plusieurs personnes non désignées nommément, sans y être au

authorization of a judge under subsection 231.2(3).

préalable autorisé par un juge en vertu du paragraphe (3).

Judicial authorization

Autorisation judiciaire

(3) A judge of the Federal Court may, on application by the Minister and subject to any conditions that the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection (1) relating to an unnamed person or more than one unnamed person (in this section referred to as the "group") if the judge is satisfied by information on oath that

(3) Sur requête du ministre, un juge de la Cour fédérale peut, aux conditions qu'il estime indiquées, autoriser le ministre à exiger d'un tiers la fourniture de renseignements ou la production de documents prévues au paragraphe (1) concernant une personne non désignée nommément ou plus d'une personne non désignée nommément — appelée « groupe » au présent article — , s'il est convaincu, sur dénonciation sous serment, de ce qui suit :

(a) the person or group is ascertainable; and

a) cette personne ou ce groupe est identifiable;

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

b) la fourniture ou la production est exigée pour vérifier si cette personne ou les personnes de ce groupe ont respecté quelque devoir ou obligation prévu par la présente loi;

(c) and (d) [Repealed, 1996, c. 21, s. 58(1)]

c) et d) [Abrogés, 1996, ch. 21, art. 58(1)]

(4) to (6) [Repealed, 2013, c. 33, s. 21]

(4) à (6) [Abrogés, 2013, ch. 33, art. 21]

Compliance order

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

Ordonnance

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

Notice required

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

Avis

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

Judge may impose conditions

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the

Conditions

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

judge considers appropriate.

Contempt of court

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

Outrage

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

Appeal

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

Appel

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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