

# LEGAL POST

*Know the Law*

TRENDING [Amaya](#) | [Tax Season](#) | [BlackBerry](#) | [Oil](#) | [Loonie](#) | [Valeant](#) | [Housing](#) | [Alberta](#)

## Vern Krishna: Confidential doesn't mean 'privileged' when it comes to advice from accountants



VERN KRISHNA | March 29, 2016 | Last Updated: Mar 29 3:14 PM ET  
[More from Vern Krishna](#)



Under common law rules, communications between an accountant and a client are generally not privileged.

Canada is on a binge of disclosure of confidential financial information. Communications between accountants and their clients are confidential, but do not enjoy privilege from non-disclosure.

In my [most recent column](#), I wrote about how [Canada's tax law has chipped away](#) at the privilege that traditionally protects communications between lawyers and clients. Given the important role accountants play in advising clients on tax matters, this column will address how the law treats communications between clients and their accountants.

Communications between clients and accountants are confidential, but this confidentiality does not come with the same protection as privilege. Client-accountant communications are available to an expanding body of domestic and international law enforcement and regulatory agencies. Canada draws a line at extending legal privilege to accountants based on wider community interests in full disclosure in judicial proceedings.

Under The Proceeds of Crime (Money Laundering) and Terrorist Financing Act, for example, the Financial Transactions and Reports Analysis Centre of Canada, commonly known as FINTRAC, has regulatory oversight of financial transactions.

The March 2016 Budget announced extended information exchange between Canada and foreign tax authorities in matters pertaining to perceived tax avoidance arrangements, which inevitably contain confidential accounting information.

Similarly, the Organisation for Economic Co-operation and Development (OECD) and the European Parliament want to pierce through professional secrecy of otherwise perfectly legal tax arrangements. A [recent resolution](#) of the European Parliament on tax rulings and other measures calls on the commission to look into the possibility of sanctioning “accountancy firms and financial advisers proved to be involved in implementing or promoting illegal tax avoidance and aggressive tax planning.”

Under common law rules, communications between an accountant and a client are generally not privileged. Taxpayers cannot claim privilege for their accountants’ audit working papers and tax files.

Yet there can be exceptions to this. If the taxpayer’s solicitor retains the accountant on behalf of the client as her agent — a situation known in law as a “Kovel letter” — any papers that the accountant prepares as part of the agency contract belong, in effect, to the solicitor and therefore may be privileged communications. Clients must carefully consider the nature of their correspondence with accountants and, more importantly, how they store such communications on computer hard drives.

But to repeat the point, that protection can arise within a specific situation involving a lawyer. Accountants do not enjoy a “class privilege” when it comes to income tax law in respect of client communications. This is so even if the accountant strays into the legal arena and renders a legal opinion or advice based on his or her interpretation of the income tax law as incorporated in a federal statute.

In a 2003 case called [Tower](#), for example, the Minister of National Revenue sought certain sensitive information from an accounting firm. The information included tax planning documents for clients who sought to give up Canadian residence status in 1998 and wanted to minimize the “departure tax” that would have been payable.

The accounting firm refused to disclose the information to the CRA and claimed privilege. Where a relationship falls within a protected class privilege, there is a prima facie presumption that the documents are inadmissible in legal actions. However, the Federal Court dismissed the argument that accountants have such class privilege.

The essential element in preserving legal privilege is that the parties intend the document to remain confidential as against outsiders. The parties may expressly state their expectations that the opinion is for the benefit of all parties to the transaction. The law may also imply expectations from the conduct of the parties.

There is, however, no bright line test to determine when persons waive privilege in a common interest transaction through disclosure. Each case depends upon its own facts. For example, corporations to a potential merger or acquisition may have a common interest to complete the transaction, but may also have other interests that are adverse to each other. It is a question of fact whether the common interest privilege applies to disclosure in these circumstances.

The most prudent course of conduct is to clearly specify and claim the privilege at the time that the advisor prepares the document, and state the expectation of the parties to the transactions that they do not intend to waive the privilege by disclosing the opinion to common interests.

It is a question of fact whether a document is “an accounting record.” Solicitors’ charge sheets and statements of accounts are not accounting records and, therefore, may be the subject of a claim of privilege. Accounting records such as ledgers, books of accounts and supporting documents cannot be privileged.

So, the courts have rejected claims for class privilege for accountants. The policy reason for permitting legal class privilege is that the law protects communications between lawyers and clients, so that clients can obtain frank and candid advice from their lawyers. But the law draws a line at extending the same privilege to clients who seek financial advice from accountants, even though they also deal with confidential financial matters.

The logic is not perfect, but is based on a balancing of the wider community interests in full disclosure in judicial proceedings.

[Vern.Krishna@TaxChambers.ca](mailto:Vern.Krishna@TaxChambers.ca)

*Vern Krishna is a professor in the common law section of University of Ottawa Law School and counsel with TaxChambers LLP in Toronto*