

Chapter 12

Rethinking Privilege for Tax Professionals: A Tax Policy Perspective

*Samuel Singer**

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I. Who Gets Privilege?

Canadian taxpayers regularly turn to tax professionals for advice on tax planning and tax disputes with government bodies. At times unbeknownst to them, their choice between consulting a tax lawyer or an accountant can have serious consequences on the protection of their confidential information. In Canada, while tax lawyers offer the safety of solicitor-client privilege under the common law, there is no such wide-sweeping privilege for the accountant-client relationship. Information exchanged between an accountant and a client, while confidential under Canadian professional codes of conduct, is not privileged unless it falls within limited common law exceptions. Several countries, including New

* Assistant Professor, Faculty of Law, Thompson Rivers University. I am grateful to Dean Blachford, Kim Brooks, Monica Cheng, and Allison Christians for their conversations with me about various aspects of this article. I note that all errors and opinions are my own. I also thank Firdous Safi for his excellent research assistance.

Zealand, the United Kingdom, and the United States,¹ have legislated to extend limited privilege to accountants. To date, Canada has declined to do so. As a result, the type of tax advice a Canadian taxpayer seeks and the structuring of the relationships between their tax professionals can have significant consequences on whether they are afforded the benefits of privilege.

A. A Tax Policy Perspective

Canadian tax scholars and practitioners frequently address the lack of privilege for accountants and argue for or against expanded protections.² This article contributes to that discussion by adding a tax policy perspective. It uses tax policy criteria to critically evaluate the different treatment of lawyer-client and accountant-client relationships under the rules of privilege in Canada. Tax policy analysis relies on normative criteria for assessing tax systems — most frequently, the criteria of equity, neutrality, and simplicity.³ Using tax policy criteria to assess the differential treatment of the accountant-client and lawyer-client relationship under the law of privilege helps clarify both the problems with limiting privilege for tax advice and the justifications that may support it.

On most counts, the lack of privilege afforded to accountant-client relationships fails under the tax policy spotlight. The distinction between accountants and lawyers raises equity concerns, as it allows for distinct treatment between taxpayers based on which tax advisor they consult. Differences in access to privilege run counter to the principle of neutrality,

¹ The Canadian Chamber of Commerce, “Extending Advice Privilege to Qualified Non-Lawyer Tax Professionals” in *Policy Resolutions 2013* (Toronto: Canadian Chamber, 2013) at 20; William R. Lawlor, “Extending Privilege to Accountants: Should We Follow the American Lead?” 4:1 Report of Proceedings of Fiftieth Tax Conference, 1998 Tax Conference (Toronto: Canadian Tax Foundation, 1999) at 6, 11; *Internal Revenue Code*, IRC § 7525 (2000) [IRC].

² See e.g. Ivan F. Ivankovich, “A Question of Privilege: Confidential Communications and the Public Accountant” (1994) 23:2 Canadian Business Law Journal 201; Lawlor, *supra* note 2; Paul D. Paton, “Accountants, Privilege, and the Problem of Working Papers” (2005) 28:2 Dalhousie LJ 353; Canadian Chamber of Commerce, *supra* note 2; Vern Krishna, “Taxpayers’ Rights” in *Practical Insights, Tax Dispute & Resolution Centre* (Toronto: Thomson Reuters, 2016); Gary Goodwin, “Let the Accountants Regulate”, *Canadian Lawyer* (September 10, 2018), online: < www.canadianlawyermag.com/author/gary-goodwin/let-the-accountants-regulate-16134/ > .

³ See e.g. Neil Brooks, “The Logic, Policy and Politics of Tax Law,” in Tim Edgar, Jinyan Li & Daniel Sandler, eds, *Materials on Canadian Income Tax*, 12th ed. (Toronto: Carswell, 2000); Allison Christians, “Introduction to Tax Policy Theory”, *Social Science Research Network* (May 29, 2018), online: < ssrn.com/abstract=3186791 > [Christians, “Introduction”] who describes similar concepts, but uses the terms equity, efficiency, and administrative capacity; OECD, G20, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (Paris: OECD, 2015) at 30-32, online: < dx.doi.org/10.1787/9789264241046-en > [OECD, *Addressing Tax Challenges*].

creating distortions in the tax advice market to increase access to privilege, and incentivizing rent-seeking behaviour. The complexity of the rules limiting privilege for tax accountants results in increased administrative and compliance burdens, as taxpayers structure their transactions and relationships with professionals to obtain privileged advice.

Despite these concerns with the rules of privilege, there are recurring objections to extending privilege to accountants that stand up under policy analysis. The first objection lies in differentiating the roles and obligations of tax lawyers from those of accountants in relation to the administration of tax justice. While this objection does not fully account for accountants' role in the modern Canadian tax advice market, it is substantiated by the different ethical obligations and educational training of accountants compared to their tax lawyer counterparts. The second objection relates to the state's interest in increasing financial transparency and taxpayer disclosures to address tax evasion and tax avoidance. This objection is particularly cogent given the growing concerns about tax base erosion and its relationship to income inequality. Where statutory privilege has been extended to accountants, it is generally limited so as to address these concerns.

This study begins by discussing tax policy criteria and its applicability to the rules of privilege in Canadian tax law. It then describes the rules of privilege in Canada as they apply to tax advice and notes the approach to privilege for accountants in other jurisdictions. The article then launches into the application of tax policy criteria to the differential treatment of communication between clients and their accountant or lawyer. It assesses the fairness of the current rules, the effects of the rules on taxpayers and the tax advice market, and the relationship between the rules limiting privilege and the administration of the tax system.

II. Tax Policy Criteria

Tax policy analysis is generally guided, at minimum, by the principles of equity, neutrality, and simplicity, although the terminology chosen to express these concepts may differ. Allison Christians asserts that most tax scholarship believes taxation should be guided by the principles of equity, efficiency, and administrative capacity.⁴ The Organisation for Economic Cooperation and Development (OECD) lists similar goals in designing tax systems: the principles of neutrality, efficiency, certainty and simplicity, effectiveness and fairness, and flexibility.⁵ Arthur Cockfield argues that the principles of efficiency and fairness should guide the design of tax information exchange between nations.⁶

⁴ Christians, "Introduction", *ibid.* at 10-11.

⁵ OECD, *Addressing Tax Challenges*, *supra* note 3 at 30-32.

⁶ Arthur Cockfield, "Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border

Given that the rules of privilege are legal creatures separate and apart from the tax system, some may question whether tax policy criteria are appropriate to assess the rules of privilege in Canadian tax law. The rules of privilege have no specific revenue-raising function in the tax system. Yet with the extension of limited statutory privilege to accountants in some jurisdictions, including under the *Internal Revenue Code* in the United States, privilege for accountants has been adopted as a rule of tax administration. Access to privileged advice from tax accountants arguably assists with the revenue raising goals of tax by promoting taxpayer compliance, ensuring equitable access to tax advice, and contributing to the fair administration of the tax system. Analyzing the rules of privilege from a tax policy perspective helps situate the question of privilege for tax professionals within the specific context of the Canadian tax advice ecosystem.

Regardless, for those who may object to using tax policy criteria to analyze the rules of privilege in tax, any consideration of extending privilege to accountants should be rooted in a rigorous analysis of the policy implications of that decision. While the terminology may differ, Neil Brooks emphasizes that the criteria applied to assess tax policy decisions are the same as those that should be used to assess any legal policy choice: the fairness of the legal rule, the incentive impacts of the rules, and the administrability of the rules.⁷

The question of whether to extend privilege to the accountant-client relationship is a contentious one, and heatedly debated in a competitive tax advice market that includes law firms, accounting firms, and multidisciplinary practices. For some, the differential treatment of confidential information to obtain the same tax advice is deeply troubling. The Canadian Chamber of Commerce has put forward a strong policy position in support of extending privilege to accountants:

It is in the public interest to extend advice privilege for all qualified accounting professionals. Extending privilege would facilitate consumer choice and would promote fairness and equity in the operation of the tax system as all taxpayers would be treated equally. Additionally, having clearly defined rules of privilege that apply to all taxpayers would ensure a better functioning self-assessment tax system — taxpayers will have a better understanding of the existence of privilege and will be able to obtain more complete and accurate advice. The advice can promote voluntary compliance by taxpayers. Finally, extending advice privilege would put Canada on an equal footing with its counterparts in other major jurisdictions.⁸

Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights” (2010) 42:2 UBC L Rev 420 at 453-454 [Cockfield, “Protecting”]. For Cockfield, efficiency is comprised of keeping compliance and administrative costs down and fairness ensures the protection of taxpayer rights.

⁷ Brooks, *supra* note 3 at 64-65.

⁸ Canadian Chamber of Commerce, *supra* note 1.

For others, it is obvious that privilege is properly limited to the institution of the solicitor-client relationship and is related to lawyers' unique role in the legal system. Courts have refused to extend privilege to accountants under the common law, on the basis of the different roles of accountants and lawyers,⁹ or that extending privilege to accountants constitutes too large of a departure from the common law.¹⁰ Opinions on whether to extend privilege to accountants or to keep the status quo are vulnerable to attack for being rooted in rent-seeking, or as being coloured by dated assumptions about the role of each profession.

In this difficult landscape, this article offers tax policy criteria to assess the rule of privileges based on policy principles commonly accepted by members of the tax community, regardless of their profession. More widely, it is only by starting with rigorous policy analysis based on commonly accepted criteria that Canadians can properly consider new approaches to privilege for the accountant-client relationship. Note that this article does not reconceptualize the law of privilege fundamentally, as Adam Dodek has, proposing reconceiving privilege as rights-based, with the strongest protections available when an individual's liberty interests are at stake.¹¹ Instead, it accepts solicitor-client privilege as a starting point, and focuses on evaluating the justifications for denying that privilege to accountants and the consequences of that rule.

III. Privilege in Canadian Tax Law

Solicitor-client privilege is deeply entrenched in the Canadian legal system, frequently cited by the Supreme Court of Canada as fundamental to the proper administration of justice.¹² When income tax provisions were found to infringe on solicitor-client privilege, the Supreme Court of Canada struck them down as unconstitutional.¹³ Canadian courts have declined to grant accountant-client relationships similar recognition.¹⁴ In the leading

⁹ *Tower v. Minister of National Revenue*, 2003 FCA 307 (F.C.A.) [*Tower*].

¹⁰ *R. (on the application of Prudential) (Appellants) v. Special Commissioner of Income Tax and another*, 2013 UKSC 1 [*Prudential*].

¹¹ Adam M. Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35:2 Queen's Law Journal 493 [Dodek, "Reconceiving"].

¹² *R. v. McClure*, 2001 SCC 14 (S.C.C.); *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (S.C.C.); *Canada (Procureur général) c. Chambre des notaires du Québec*, 2016 SCC 20 (S.C.C.) [*Chambre des notaires*].

¹³ *Chambre des notaires, ibid.*

¹⁴ See e.g. *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] C.T.C. 353 (Can. Ex. Ct.) at 5283; *Baron v. R.* (1989), (*sub nom.* *Baron v. Canada*) [1990] 2 F.C. 262 (Fed. T.D.), reversed 1990 CarswellNat 726, 1990 CarswellNat 514 (Fed. C.A.), affirmed 1993 CarswellNat 845, 1993 CarswellNat 1375 (S.C.C.); *Cineplex Odeon Corp. v. Canada (Attorney General)*, [1994] 2 C.T.C. 293 (Ont. Gen. Div.) at para. 13; *Long Tractor Inc. v. Canada (Deputy Attorney General)* (1997), 155 D.L.R. (4th) 747 (Sask. Q.B.) at paras. 13, 14 and 20 [*Long Tractor*]; *Belgravia Investments Ltd. v. R.*, 2002 FCT 649 (Fed. T.D.) [*Belgravia*]; *Tower, supra* note 9.

Canadian case on the subject, *Tower v. Minister of National Revenue*,¹⁵ the Federal Court of Appeal refused to extend privilege to communications between accountants and the clients. The Court emphasized that the basis for solicitor-client privilege is to facilitate the exchange of information between a client and their lawyer, so as to obtain advice when personal or property rights are the subject of disputes.¹⁶ This privileged exchange between lawyer and client is necessary for the provision of legal advice, which is essential to the proper administration of justice. The Court distinguished the work of lawyers from the work of accountants, on the basis that accountants do not provide legal advice.

The distinction drawn in *Tower* between lawyers and accountants has significant issues, as others have discussed.¹⁷ The claim that accountants do not provide legal advice does not stand up to scrutiny. Taxpayers provide confidential information to their accountants to obtain tax advice on their obligations and rights. Accountants interpret and apply the rules found in Canadian tax legislation and regulations based on how they apply to their clients' factual circumstances. The tax positions that accountants advise clients to take may have serious legal consequences. For most Canadian taxpayers, it is not tenable to distinguish between the advice of an accountant and a tax lawyer, and even law societies recognize that accountants are called upon to provide advice on tax laws.¹⁸

Adam Dodek notes that the Court's rationale in *Tower* in support of privilege for lawyers and not accountants focused on the litigation context, where lawyers provide advice to protect clients' rights during disputes.¹⁹ The Court did not address the many contexts in which communications between a lawyer and a client are privileged but do not directly involve litigation. As Dodek asserts, this "narrow articulation ... would not apply to much of a solicitor's practice".²⁰ Once the broader application of solicitor-client privilege in Canada is acknowledged, it is more difficult to justify the differential treatment of information provided by a client to a lawyer for tax planning purposes, and to an accountant for the same purposes. Still, the Court's emphasis on the relationship between solicitor-client privilege and

¹⁵ *Tower*, *supra* note 9.

¹⁶ Adam Dodek, *Solicitor-Client Privilege*, 1st ed. (Canada: LexisNexis Canada, 2014) at 91-92 [Dodek, "Solicitor-Client"].

¹⁷ See e.g. *ibid.*; Brian M. Studniberg, "The UK Supreme Court Rekindles the Debate over a Privilege for Accountants" (2013) 61:2 Canadian Tax Journal 435 at 5. See in particular Carl D. MacArthur, *Legal Advice Privilege for Accountants' Tax Advice*, in this collection.

¹⁸ See e.g. Saskatchewan, *Final Report of the Legal Services Task Team*, by Gerald Tegart, *et al.* (Regina: Justice and Attorney General, 2018), online: <publications.gov.sk.ca/documents/9/107840-Legal> (The report acknowledged that "the Law Society is aware that there are non-lawyers providing services related to law in many areas" and went on to provide the example of accountants, who "analyze tax law and make recommendations to clients and prepare documents that have legal implications" at 14).

¹⁹ Dodek, "Solicitor-Client", *supra* note 16 at 91-92.

²⁰ *Ibid.* at 91.

the administration of justice is instructive. Lawyers hold unique ethical and legal obligations towards the administration of justice and are trained to meet those obligations. These differences will be discussed in greater detail below, in Part IV, under the tax policy criteria relating to administration of the rules of privilege in tax.

A. Common Law or Statutory Privilege

The door is likely shut for a common-law extension of privilege to the accountant-client relationship in Canada. In *R. v. Fosty*, the Supreme Court of Canada discussed the reluctance of Canadian courts to extend the common law of privilege because it interferes with truth-finding. The Court quoted Sopinka and Lederman from *The Law of Evidence in Civil Cases*:

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.²¹

In 2013, the United Kingdom Supreme Court rejected an appeal to extend common-law privilege to accountants, despite acknowledging the compelling reasons to do so.²² The Court found that such a significant shift in the long-standing laws of privilege was best left to Parliament. It emphasized that many policy considerations were necessary to determine the appropriate treatment under privilege of legal advice not just from accountants, but also from other professionals who provide legal advice but are not lawyers.²³ The Court also noted that the UK Parliament had already considered the subject of legal privilege for accountants and provided limited statutory privilege to tax advisors.

Given *Tower v. Minister of National Revenue* and the United Kingdom Supreme Court decision in *Prudential*, the extension of privilege to accountants in Canada would likely need to come from statutory amendments to federal tax legislation. To provide full coverage, provincial tax laws would also need to be harmonized. Limited statutory privilege has already been extended to accountants in the United Kingdom, New Zealand, and the United States, although each has only provided limited protection, and coverage may differ at the federal and state level, such as in the United States.²⁴

²¹ *R. v. Fosty*, (sub nom. *R. v. Gruenke*) [1991] 3 S.C.R. 263 (S.C.C.); John Sopinka & Sidney N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworth & Co, 1974), the authors remark at 157.

²² *Prudential*, supra note 10. See also Studniberg, supra note 18 at 5-6.

²³ *Prudential*, supra note 10 at paras. 49, 52.

²⁴ Studniberg, supra note 17 at 5; Linda Burilovich, "Protecting Communications and Documents From IRS Summons Enforcement" *The Tax Advisor* (March 21, 2013),

B. Exceptions Where Common-Law Privilege Applies

As the law currently stands in Canada, since general privilege between accountants-lawyers is unavailable, communications between an accountant and their client can only be privileged if they fall under two exceptions. First, privilege can apply where an accountant was acting as an agent of their client, to obtain legal advice or to facilitate the provision of legal advice (the “agent exceptions”).²⁵ Second, litigation privilege can apply where communications with the accountant (or other non-lawyers) were exchanged in contemplation of or in preparation for litigation.²⁶

The combination of a lack of general privilege for communications between accountants and clients and the availability of certain exceptions has led to much maneuvering and strategizing in the tax advice market. Accountants, lawyers, and their clients undertake careful transactional planning and structuring of the legal relationships between clients and tax professionals to fall under agency exceptions. The lack of privilege has also played a role in the competition between tax lawyers and accountants, with privilege adding value to tax lawyers’ services. These effects on the tax advice market will be discussed in further detail under the criteria of neutrality in Part V.

IV. Equity

Equity in tax policy concerns itself with whether taxpayers are treated fairly. When discussing the taxation of taxpayers, equity is premised on the normative ability to pay principle, which affirms that taxpayers should pay tax in accordance with their available resources.²⁷ Vertical equity requires progressive taxation that taxpayers who earn less income should pay less tax than those who earn more income. Horizontal equity requires that taxpayers who earn the same amount in a year pay similar amounts of tax.

These principles of equity relate directly to the revenue raising function of taxes, but their underlying principles are instructive in analyzing the fairness of the rules of privilege for Canadian tax advice. Fairness

online: < www.thetaxadviser.com/issues/2013/apr/burilovich-apr2013.html >; *Long Tractor*, *supra* note 14.

²⁵ See e.g. *Redhead Equipment Ltd. v. Canada (Attorney General)*, 2016 SKCA 115 (Sask. C.A.) at paras. 41-45; Brian R. Carr, “Solicitor-Client Privilege” 7:1 Report of Proceedings of the Sixty-Second Tax Conference, 2010 Conference Report (Toronto: Canadian Tax Foundation, 2011); *Belgravia*, *supra* note 14 at paras. 49-50.

²⁶ Christine Man, *et al.*, “Current Cases” (2013) 61:2 Canadian Tax Journal 435; *Blank v. Canada (Department of Justice)*, 2006 SCC 39 (S.C.C.) at paras. 27, 34.

²⁷ Christians, “Introduction”, *supra* note 3 at 15-16; OECD, *Addressing Tax Challenges*, *supra* note 4, c. 2 at 31.

considerations in policy decisions are frequently concerned with the equal treatment of people in fundamentally similar circumstances, while ensuring that people in dissimilar circumstances are treated differently under the law.

Fairness also requires respecting the rights of those subject to a system's rules, which is a key value in designing tax systems.²⁸ The principle of fairness in tax should be interpreted as including the need to respect taxpayer rights.²⁹ Allison Christians discusses how taxpayer rights are key to balancing the state's authority to tax.³⁰ These principles form the basis of most legal policy design decisions and provide guidance when assessing the Canadian policy of not extending privilege to accountants.

A. Access to Justice

A fairness analysis of the privilege rules raises access to justice concerns. Many Canadians cannot afford to consult lawyers, and tax law is a particularly expensive boutique market. Chief Justice Beverley McLachlin warned that Canada faces an access to justice crisis, with rising legal fees and many unmet legal needs.³¹ She emphasized that this crisis was felt not only by poor and marginalized people, but also by the middle class “who earn too much to qualify for legal aid, but frequently not enough to retain a lawyer for a matter of any complexity or length.”³²

Many Canadians can only afford to consult one type of professional for their tax matters. Given that accountants also prepare tax returns and assist with payroll and other tax obligations, that chosen tax professional is most likely to be an accountant. From a fairness perspective, taxpayers with less resources are not able to access the protection of privilege. As taxpayers speak candidly to their accountants to obtain advice on their obligations in an ever-more complicated tax regulatory landscape, the information exchanged is not privileged. For taxpayers who can afford both a lawyer *and* an accountant, privilege can be obtained by structuring their affairs so that the accountant-client relationship falls under the agent exceptions. The stakes are not small; violations of tax law can have not only significant pecuniary costs but also potential penal consequences.

Accountants may have a key role to play in responding to access to justice concerns. Gary Goodwin argued in *Canadian Lawyer* that accounting firms would be appropriate entities to provide services by alternative

²⁸ Cockfield, “Protecting”, *supra* note 6 at 453-454.

²⁹ *Ibid.* at 442-443.

³⁰ Allison Christians, “Taxpayer Rights in Canada” in César Alejandro Ruiz Jiménez, ed, *Derecho Tributario Y Derechos Humanos/Tax Law and Human Rights* (October 17, 2016), online: <ssrn.com/abstract=2797381 > [Christians, “Taxpayer Rights”].

³¹ Beverley McLachlin, “The Legal Profession in the 21st Century” *Supreme Court of Canada* (November 6, 2015), online: <www.scc-csc.ca/judges-juges/spe-dis/bm-2015-08-14-eng.aspx > .

³² *Ibid.*

legal providers, since they already provide legal advice about tax law.³³ Goodwin noted that many people are reluctant or unable to talk to lawyers, but do ask their accountants legal questions:

Many people do not even attempt to deal with their legal issues. They often question the cost and whether a lawyer is even necessary. However, people often then bring legal-type questions to their accountant, which suggests the public would more easily use this channel.³⁴

Goodwin also emphasized that accounting firms are versatile and innovative, and thus well-placed to offer a sustainable business model for alternative legal services. Chief Justice McLachlin notes that the public is increasingly demanding innovative and affordable services.³⁵ She argues that it is the legal profession's responsibility to respond to this crisis.

Based on the principles of fairness, the differential treatment of tax advice from accountants and from lawyers is unprincipled. It perpetuates the inability of lower- and middle-income earners to have equal access to justice as their wealthier counterparts. Higher income taxpayers can afford professionals in both accounting and law to best serve their tax advice needs and structure those relationships for privilege purposes. This distinct treatment also discourages the development of accessible models to deliver alternative legal services. Access to justice is not equal if affordable but unprivileged tax advice is available through accountants, while higher income taxpayers can afford the protective umbrella of privilege.

B. Fairness between Taxpayers

The rules of privilege for tax advice in Canada put similarly placed taxpayers in different legal positions, based solely on the type of tax professionals they consult, and whether they performed the appropriate legal contortions to privilege information from their accountants. Many clients may pick between tax professionals without knowing the impact of that decision. The general public sees information provided to professionals as confidential and is unlikely to distinguish between confidentiality and privilege. The lack of privilege for clients also takes away consumer choice, a core element in choosing professional counsel.

Ivan Ivankovich describes a number of cases where the same advice given by an accountant was not privileged, but would have been privileged if provided by a lawyer.³⁶ In one case, a tax opinion by an accountant was not privileged because it went directly to the client, rather than to a lawyer, while in another case an accountant's summary of a meeting between accountants

³³ Goodwin, *supra* note 2.

³⁴ *Ibid.*

³⁵ McLachlin, *supra* note 31.

³⁶ Ivankovich, *supra* note 2.

was found to be privileged because it was prepared for a lawyer.³⁷ The disparate treatment of similarly situated taxpayers likely contributed to the emergence of the agent exceptions in the case law. In *R. v. Canadian Territorial Helicopters Inc.*,³⁸ the Court described a situation where a memorandum produced by an accountant working in a law firm would be privileged, and the same memorandum produced at an accounting firm would not be protected by privilege.³⁹ The Court used this unfair result to justify extending privilege to advice provided by accountants in circumstances where the client was seeking that accounting advice via a lawyer.

Fairness concerns about similarly situated taxpayers include concerns about the administrative and compliance burdens of the current rules. Taxpayers exert much transactional energy to ensure that their confidential information is treated similarly, regardless of the type of tax advisor consulted. This is discussed in more detail below in Part V, under the criteria of neutrality.

Another objection to the denial of privilege to accountants is that Canada is out of harmony with other jurisdictions. For similarly placed taxpayers, tax advice from an accountant in Canada will not be privileged, while that same advice may be protected in other jurisdictions. This lack of international harmonization is particularly challenging for taxpayers with income in multiple jurisdictions and the associated multi-jurisdictional tax advice needs. Such taxpayers may consult accountants at a multi-national accounting firm, looking to obtain expert advice to meet their diverse tax needs. Some of this advice may be privileged, and some may not be.

C. Taxpayer Rights

Under the current system, the rules of privilege raise concerns about whether taxpayer rights are being sufficiently respected. In Christians' survey of the taxpayer rights landscape in Canada, she reviews the Canada Revenue Agency's *Taxpayer Bill of Rights*,⁴⁰ an articulation of the rights of taxpayers. While not legally binding, the *Bill of Rights* states key principles guiding the administration of tax in Canada. Principle 15 articulates the rights of taxpayers to obtain tax advice and to choose the person who represents them.⁴¹ Despite this principle, the choice of a taxpayer to seek advice from an accountant results in less protection of that taxpayers' confidential information. The rationale for privilege is to facilitate free communication between a client and their advisor so as to obtain

³⁷ *Ibid.* at 213.

³⁸ *R. v. Canadian Territorial Helicopters Inc.*, 2004 MBQB 140 (Man. Q.B.).

³⁹ *Ibid.* at para. 12.

⁴⁰ Canada Revenue Agency, *Taxpayer Bill of Rights: Understanding Your Rights as a Taxpayer*, RC17 (Ottawa: Canada Revenue Agency, 2019).

⁴¹ *Ibid.* at 10.

information about their rights and obligations. The lack of clarity as to whether privilege will apply in any given tax advice situation in Canada may undermine the right of taxpayers to counsel.

Cockfield describes the importance of solicitor-client privilege in protecting taxpayer rights, situating it as a key part of democracy:

As oft noted, laws that protect solicitor-client privilege are a critical component of a democratic society: individuals need to be able to seek advice from and communicate with lawyers (*or accountants under the laws of some countries*) without worrying that the confidentiality of these communications will be breached by a third party.⁴²

If the protection of taxpayer rights is so important, why doesn't Canadian law offer equal protection for taxpayers seeking professional tax advice? As Cockfield notes, information communicated to accountants is protected by privilege in some countries.

The justification for distinguishing between accountants and lawyers in *Tower v. Minister of National Revenue* was that accountants do not provide legal advice. Yet tax planning services are provided by both accountants and lawyers; indeed, they compete for clients to offer these services, as discussed below under the criteria of neutrality. Accountants are also on the frontlines of tax disputes that come up in the course of conducting compliance work and undertaking audits. At the same time, Canada has a self-reporting tax system, and disclosure mechanisms regarding certain financial and tax information are essential to the administration of tax justice.

Under the consideration of taxpayer rights, *Tower* is correct that the roles of accountants and lawyers are different in some respects. Some tasks should only be done by each respective profession — lawyers draft transfer agreements and plead in court,⁴³ and only qualified accountants can undertake audits. Accountants may not have the appropriate training to advise clients on some matters that come up during tax advice, including when liberty interests are at stake. The distinct roles of each profession are discussed in further detail below when considering the privilege rules as they relate to the administration of the tax system.

⁴² Cockfield, "Protecting", *supra* note 6 at 442-443 [emphasis added].

⁴³ Note that under Informal Procedure, a taxpayer may be represented by an agent, which may include an accountant, but accountants cannot represent taxpayers under General Procedure, see ss. 17, 18.14 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. See also *Suchocki Accounting Ltd. v. The Queen*, 2018 TCC 88 (T.C.C. [General Procedure]); *Masa Sushi Japanese Restaurant Inc. v. The Queen*, 2017 TCC 239 (T.C.C. [General Procedure]).

V. Neutrality

Under neutrality, tax policy considers whether tax rules are neutral and efficient, or if they cause distortions of taxpayer behaviour and the economy.⁴⁴ The OECD explains that “neutrality also entails that the tax system raises revenue while minimizing discrimination in favour of, or against, any particular economic choice.”⁴⁵ In legal policy analysis more generally, it is at this stage that law-makers consider the incentives caused by legal rules, both intended and unintended.

In the Canadian context, the behaviour distortions caused by the current rules around privilege are widespread. Due to the lack of privilege, accountants face a disadvantage while competing for similar tax planning work. Tax lawyers market the benefits of solicitor-client privilege and the need to include lawyers within a client-accountant relationship to obtain the benefit of privilege. Accounting firms also increasingly offer legal service divisions, providing their clients with greater access to privilege. Transaction costs are higher due to the need to structure relationships between accountants and lawyers carefully to spread the umbrella of privilege.

A. Market Forces in Law and Accounting

Privilege, and the lack thereof, is a strong influence in the tax market. Ivankovich argues that the lack of privilege for accountants is economically inefficient. He asks: “[s]hould not the client’s confidences be protected if candid disclosure by the client is a prerequisite to the provision of effective tax advice, regardless of who dispenses that advice?”⁴⁶ He goes on to argue that statutory privilege should be extended to accountants for matters that fall under Canadian tax legislation so as to remove tax lawyers’ competitive advantage.⁴⁷

Tax lawyers in Canada do use the advantage of privileges as a boost in a competitive market, highlighting that only privilege guarantees confidentiality.⁴⁸ Arguably, lawyers are also ethically bound to advise their clients of the distinction between the protection of information disclosed to lawyers and accountants. In the United States, when the IRS introduced legislative privilege for accountants under federal tax law, some lawyers were chagrined.⁴⁹ The American Bar Association took a stand against the extension of privilege to accountants.⁵⁰ Concerns about privilege taking

⁴⁴ OECD, *Addressing Tax Challenges*, *supra* note 3, c. 2 at 30-32.

⁴⁵ *Ibid.*, c. 2 at 30.

⁴⁶ Ivankovich, *supra* note 2 at 233.

⁴⁷ *Ibid.* at 233-234.

⁴⁸ Dodek, “Solicitor-Client”, *supra* note 16 at 92.

⁴⁹ Elijah D. Farrell, “Accounting Firms and the Unauthorized Practice of Law: Who is the Bar Really Trying to Protect?” (2000) 33:2 *Indiana Law Review* 599.

⁵⁰ *Ibid.*

away lawyers' competitive edge in the tax advice market may appear like rent-seeking, with the extension of privilege seen as a threat to lawyers' monopoly on legal services. Lawyers are also concerned about whether accountants lack the appropriate training to handle certain legal matters.

Market forces in law and accounting are leading to more multi-disciplinary practices, which may favour accounting firms. Concerns about privilege may lead clients to knock at tax lawyers' doors, but concerns about the high costs of the legal billable door might lead them to more innovative models. In 2015, *The Economist* published an article titled "Lawyers Beware: The Accountants Are Coming After Your Business".⁵¹ The Big Four accounting firms provide legal services that are complementary to their other services and employ almost 9,000 lawyers internationally.⁵² By including a legal division in their practice, accounting firms can offer privilege more easily, with relationships between legal divisions and accounting appropriately structured to fit under the agent exceptions.

The large accounting firms may be more flexible than the traditional law firm model, embracing legal innovation and technology. The multi-disciplinary model is likely to spread beyond the largest accounting firms, as calls for access to justice increasingly include considerations of how non-legal professionals and multi-disciplinary practices can respond to unanswered legal needs. Chief Justice McLachlin noted that clients as consumers are increasingly rejecting the law firm model, particularly given the role of the Internet:

In the age of the Internet, people are questioning why they, the consumers of legal product, should be forced to go to expensive lawyers working in expensive office buildings located in expensive urban centres. Why, they ask, should a client retain lawyers, when integrated professional firms can deliver accounting, financial and legal advice?⁵³

When client needs are the focus, the market requires that tax advisors respond by working together, both to extend the protection of privilege and to address frustrations with the traditional, expensive legal services model. Such responses include addressing inefficiencies in the market with the creation of multi-disciplinary practices, and lawyers and accountants working together within transactions and mandates to extend the protection of privilege to clients.⁵⁴ Growing pains are also sure to ensue. In April 2018, Conduit Law LLP, a legal services firm, departed Deloitte after

⁵¹ Shannon Stapleton, "Lawyers Beware: The Accountants are Coming after Your Business", *The Economist* (March 22, 2015).

⁵² Jim Middlemiss, "Accounting for Legal Work", *Canadian Lawyer Magazine* (April 2, 2018), online: <www.canadianlawyermag.com/author/jim-middlemiss/accounting-for-legal-work-15535/> .

⁵³ McLachlin, *supra* note 31.

⁵⁴ See e.g. Middlemiss, *supra* note 52, who argues that accounting and law firms are entering a new era of "co-opetition", in which law firms both compete with accounting firms and work together with those firms to respond to their needs.

initially joining it in 2016 to respond to the needs of the market. Despite this rapid rupture, its founder, Peter Carayiannis, emphasized that the accounting and law professions must continue to work together, as “the client is looking for a solution and usually doesn’t care about who the actual provider is”.⁵⁵

B. Transactional Deadweight

Under the status quo, concerns about privilege add deadweight loss to the tax advice market, as professional relationships are structured to extend privilege. Clients are advised to consider the lack of privilege of information provided to accountants, and to ensure that steps are taken to provide as strong a privilege claim as possible over their confidential information. For example, accountants’ work product assessing a corporation’s tax positions was found not to be privileged in *Canada (National Revenue) v. Atlas Tube Canada ULC*.⁵⁶ In response, lawyers advised that extra steps be taken to mark communications as privileged and to ensure there is contemporaneous evidence of the intention that documents are being exchanged for the purpose of obtaining legal advice.⁵⁷ Clients were also advised to obtain advice on how to structure relationships between their tax professionals, including which professional is officially engaged to provide the services, to improve the strength of a privilege claim over due diligence reports.⁵⁸ More generally, tax lawyers regularly discuss tips for maintaining privilege, which evidently include structuring professional relationships to centre lawyers.⁵⁹

⁵⁵ *Ibid.*

⁵⁶ *Canada (National Revenue) v. Atlas Tube Canada ULC*, 2018 FC 1086 (F.C.).

⁵⁷ Edwards Davis & Stevan Novoselac, “Accountant Work Product Not Privileged and Must be Produced to CRA: Canada v. Atlas Tube Canada ULC” *Gowling WLG* (December 18, 2018), online: <gowlingwlg.com/en/insights-resources/articles/2018-accountant-work-must-be-produced-to-cra/>.

⁵⁸ Laurie A. Goldbach & Bhuvana Sankaranarayanan, “CRA’s Power To Compel Taxpayers To Disclose Uncertain Tax Positions Affirmed” *Borden Ladner Gervais* (November 14, 2018), online: <blg.com/en/News-And-Publications/Publication_5461>.

⁵⁹ See e.g. Jayson Peace & Amanda SA Doucette, “Best Practices for People who are Practising Tax” (2014) 13:1 *Prairie Provinces Tax Conference* (Toronto: Canadian Tax Foundation, 2014) at 12-13; L. David Fox, “Lawyers, Accountants and Privilege” (June 2015) 4:4 *Tax Executives Institute, Inc 2*; Scott HD Bower, *et al.*, “Legal Privilege”, *Bennett Jones* (December 2016) online: <www.bennettjones.com/en/Publications-Section/Guides/Legal-Privilege>; Krishna, *supra* note 3; Cheryl Gibson & Laurie Goldbach, “Tax Disputes and Litigation: Tips and Traps for Planners” (2016), 16:1 *Report of the Proceedings of the Sixty-Eighth Tax Conference, 2016 Conference Report* (Toronto: Canadian Tax Foundation, 2017) at 7-8.

C. Protecting Clients

The current legal framework for privilege leaves lawyers in a difficult position. Lawyers acknowledge that accountants provide unique services to clients, but there is also overlap between the tax advice services that both accountants and lawyers can provide. To protect taxpayer rights and to respect their ethical duties towards their clients, lawyers must recommend that clients structure their legal relationships to extend the umbrella of privilege. Yet these recommendations may also appear like rent-seeking by lawyers looking to preserve their centrality to tax advice services. Extending limited privilege to accountants may be both in the interests of the legal profession and in the interests of clients. If the legal profession supports statutory privilege for tax accountants in some circumstances, it may help counter perceptions that lawyers use privilege to preserve their monopoly on legal services rather than to protect clients.⁶⁰

VI. Simplicity

Under the final tax policy criteria, simplicity, Canadian tax privilege rules have a mixed result. It is at this stage of legal policy analysis that the administrability of rules must be considered. The principle of simplicity requires tax rules to be reasonably easy to comply with and to administer. The OECD provides that “[t]ax rules should be clear and simple to understand, so that taxpayers know where they stand.”⁶¹ Proper mechanisms should be in place to ensure fairness and clarity in compliance obligations and in tax disputes. There should also be certainty in the tax treatment of transactions. The OECD also describes the principles of certainty and simplicity as making it easier for taxpayers to understand their rights and enable them to make informed decisions. The Canada Revenue Agency’s *Taxpayer Bill of Rights* emphasizes the right of taxpayers to get tax advice and Canada’s commitment to minimizing the costs of taxpayer compliance.

The modern tax advice context does not sufficiently justify the distinct treatment of confidential information disclosed by clients to lawyers and accountants. The legal profession does not have a monopoly on tax advice, as accountants regularly interpret tax laws.⁶² In the current legal landscape, the lack of general privilege for accountants combined with the possibility of structuring to fall under common-law exceptions creates complexity and uncertainty. Tax advisors cannot predict whether information will be

⁶⁰ Adam Dodek explores the protectionist rationale for privilege and criticizes it in Dodek, “Reconceiving”, *supra* note 11.

⁶¹ OECD, *Addressing Tax Challenges*, *supra* note 3, c. 2 at 30.

⁶² See e.g. Gary A. Munneke, “Lawyers, Accountants, and the Battle to Own Professional Services” (1999) 20:1 *Pace Law Review* 73 at 77; Farrell, *supra* note 49 at 625.

privileged, and taxpayers who obtain tax advice from accountants are unsure how their confidential information will be treated. The differential treatment of the accountant-client relationship adds both administrative and compliance costs. Expanding privilege would equalize access to privilege by taxpayers and simplify the tax system.

There are also key objections related to the administration of the tax system that support the distinct treatment of accountants and lawyers under the rules of privilege. These relate to the different ethical duties of lawyers, the legal education that law students receive, and the interest of a self-reporting tax system in reducing impediments to preventing tax evasion and avoidance.

A. The Ethical Duties of Accountants and Lawyers

From the perspective of the administration of the tax system, the distinction between the lawyer-client and accountant-client relationship under privilege may be justified by lawyers' distinct duties under their ethical codes and their educational training.

Both lawyers and accountants are bound by the duty of confidentiality under the ethical codes.⁶³ The commentary on the ethical codes of lawyers notes that the obligation of confidentiality is broader than the rules of privilege, providing further protection even where privilege would not apply.⁶⁴ For accountants, their ethical code addresses accountants' duty of confidentiality and includes commentary advising accountants to obtain legal advice where there is any question as to whether documents should be disclosed.⁶⁵ While lawyers are expected to understand legal privilege, accountants are advised to consult legal counsel to understand the scope of privilege and how to best protect taxpayer rights.

It is in their duties to the public and to the legal system that lawyers and accountants particularly differ. Accountants do owe an explicit duty to the public interest.⁶⁶ For example, Rule 201.1 of the *CPA Codes of Conduct*, in both Ontario and British Columbia, provides: “[a] member or firm shall act at all times with courtesy and respect and in a manner which will maintain the good reputation of the profession and serve the public interest.”⁶⁷

⁶³ See e.g. Law Society of Ontario, *Rules of Professional Conduct* (Toronto: Law Society of Ontario, 2018), s. 3.3; Chartered Professional Accountants of Ontario, *CPA Code of Professional Conduct* (Ontario: CPA, 2016), s. 208 [CPA Ontario]; Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (Vancouver: Law Society of British Columbia, 2018), s. 3.3; Chartered Professional Accountants British Columbia, *CPA BC Code of Professional Conduct* (Vancouver: CPABC, 2018), s. 208 [CPA BC].

⁶⁴ Law Society of Ontario, *ibid.*, s. 3.3-1, commentary [2]; Law Society of British Columbia, *ibid.*, s. 3.3-1, commentary [2].

⁶⁵ CPA BC, *supra* note 63, s. 208, Guidance 2.

⁶⁶ Law Society of Ontario, *supra* note 63, s. 3.3; CPA Ontario, *supra* note 63, s. 208; Law Society of British Columbia, *supra* note 63, s. 3.3; CPA BC, *supra* note 63, s. 208.

⁶⁷ CPA Ontario, *supra* note 63, s. 201.1; CPA BC, *supra* note 63, s. 201.1.

Lawyers also owe specific robust duties to the courts and to the administration of justice. The *Rules of Professional Conduct* in both Ontario and British Columbia delineate lawyers' duties to respect the administration of justice and to encourage public confidence in the justice system.⁶⁸ Accountants do not have such obligations and the concept of "public interest" is not defined. Lawyers are called upon to be loyal in their duties to a client specifically while also respecting the administration of justice generally.

B. Legal Training

As part of their legal training, law students are taught about their responsibilities to the administration of justice. The Federation of Law Societies of Canada has a National Requirement that all Canadian common law programs must satisfy for accreditation.⁶⁹ These requirements include knowledge about the administration of justice and of "the importance and value of serving and promoting the public interest in the administration of justice."⁷⁰ The difference in the duties and training for accountants and lawyers are most notable in the context where lawyers need to advise clients about their legal responsibilities, performing a delicate balancing act to respect both their duties to their clients and to the administration of justice.

While accountants are bound to act in the public interest, they do not have the same obligations towards the justice system, nor the training to prepare them to navigate such tax disputes. Accountants may not be able to provide the fulsome advice that privilege was meant to encourage between solicitor and client. Law societies in Canada currently accept that accountants perform some tasks that are otherwise reserved for lawyers, but evidently on the basis that these pose little risk to the public.⁷¹ The professional bodies regulating each profession, and the insurers underwriting professional liability risks, may not be prepared to take on the regulation and responsibility for accountants diving deeper into the practice of law.

Any consideration of whether to extend privilege to accountants will need to contend with questions of regulation and training of accountants, and with the different nature of accountants' work. Should privilege be

⁶⁸ Law Society of Ontario, *supra* note 63, c. 5; Law Society of British Columbia, *supra* note 63, c. 5.

⁶⁹ Federation of Law Societies of Canada, "National Requirement" (January 1, 2018), online: <flsc.ca/wp-content/uploads/2018/01/National-Requirement-Jan-2018-FIN.pdf> .

⁷⁰ *Ibid.* at 2.1.

⁷¹ Saskatchewan, *Final Report*, *supra* note 18 at 14.

extended to any work of accountants conducted under tax legislation, or only work that constitutes legal advice about a taxpayer's rights and obligations?⁷²

As emphasized by the United Kingdom Supreme Court in *Prudential*, the policy considerations of extending privilege to accountants will inevitably invite inquiries as to whether statutory privilege should be extended to other professionals offering legal services.⁷³ From there, debates about the current monopoly of the legal profession, the access to justice crisis, and Canadians' rights to representation are sure to ensue.

C. Tax Avoidance and Evasion

The other key objection to extending privilege to accountants is that it may run counter to Canada's efforts to increase financial reporting and exchanges of taxpayer information. Income inequality and eroding tax bases have brought global attention to the issues of tax avoidance and tax evasion.⁷⁴ Tax systems increasingly require taxpayers to provide financial disclosures and nation states are parties to cross-border tax information exchange agreements. Taxpayers' rights to privacy and confidentiality must be balanced against the need to increase fair taxation and prevent evasion in a self-reporting system.⁷⁵

To date, statutory extensions of privilege to accountants do not provide the sweeping privilege that is available for communications between a lawyer and their client. Instead, statutory privilege is limited by exceptions to address concerns about criminal tax behavior and tax avoidance. In the United States, for example, privilege for federally authorized tax practitioners is only available in civil disputes with the tax authorities and in federal litigation.⁷⁶ Privilege does not apply in criminal proceedings, nor does it apply to communications relating to the promotion of tax shelters. In New Zealand, the tax authorities describe a number of tax documents that record financial facts which are excluded from statutory privilege for accountants.⁷⁷ Documents created in relation to an illegal act are also not privileged.

⁷² See Christine Man, et al., *supra* note 26 at 9. See Carl D. MacArthur, *Legal Advice Privilege for Accountants' Tax Advice*, in this collection for a detailed discussion.

⁷³ *Prudential*, *supra* note 10 at para. 52.

⁷⁴ Arthur Cockfield, "How Countries Should Share Tax Information" (2017) 50:5 *Vanderbilt Journal of Transnational Law* 1091.

⁷⁵ Christians, "Taxpayer Rights", *supra* note 30.

⁷⁶ *IRC*, *supra* note 1, § 7525; Nicholas Nebolsine, "The Sec. 7525 privilege relating to taxpayer communications" *The Tax Advisor* (August 1, 2018), online: www.thetaxadvisor.com/issues/2018/aug/sec-7525-privilege-taxpayer-communications.html > .

⁷⁷ NZ, Inland Revenue, *ED0202: Non-disclosure right for tax advice documents* (exposure draft, comment deadline May 11, 2018), online: < www.ird.govt.nz/public-consultation/current/archive/public-consultation-ED0202.html > .

In Canada, an extension of statutory privilege will face similar policy constraints. If statutory privilege is adopted, it is likely that the legislature will choose a model of limited privilege. This may help resolve policy issues with the current rules of privilege for tax advice while also adhering to the tax policy priority of promoting fair taxation. Limited statutory privilege may also fail to resolve a number of policy issues or create new ones. Limited privilege may lead to a new patchwork system for privilege, particularly if federal tax privilege is not matched at the provincial level. This could result in continued inequity for taxpayers and distortion in the tax advice market. It is likely, however, that a statutory extension of privilege would at least add a measure of clarity for taxpayers.

VII. A Tax Policy Reassessment of Privilege

Tax policy analysis helps clarify the problems with the current rules of privilege in Canada for tax advice. The inequity of differential treatment of tax advice and the distortion caused by the common-law rules for privilege highlight the need to reconsider denying privilege to tax advice by accountants. The complexity of the rules of privilege and its administrative and compliance burdens also provide pressure for a policy change. The case for change is also supported by the fact that Canada's approach to tax privilege is out of harmony with other national counterparts. Tax policy analysis also assists in identifying the justifications for only providing privilege to the lawyer-client relationship. The special role that lawyers have in the administration of justice cannot be ignored. Nor can the need to increase financial transparency and the tools available to tax authorities to fight aggressive tax avoidance and evasion.

A balanced modern approach may lie in the legislated recognition of limited privilege to recognize the role of accountants in providing tax advice, while allowing for clear exceptions to continue to facilitate tax administration. To justify such an extension of privilege, accountants would need to take on ethical duties to the administration of tax justice and obtain further educational training to understand their extended legal obligations and the rules of privilege. Accountants must consider whether they are prepared to self-regulate their additional duty to the administration of justice and to their clients. This includes considering whether clients are sufficiently protected in cases of professional errors or omissions in files that might otherwise have benefited from the advice of legal counsel.

With evidentiary privilege comes great responsibility, both ethical and legal. The case for increasing access to privilege for tax advice is compelling. So too is the need to ensure that any change in the law considers the ongoing protection of the administration of justice and of taxpayers.