INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Canada

(ICSID Case No. ARB/16/16)

PROCEDURAL ORDER NO. 6

DECISION ON COMMON INTEREST PRIVILEGE, LIMITED WAIVER OF PRIVILEGE AND SUBJECT MATTER WAIVER OF PRIVILEGE

Members of the Tribunal
Prof. Georges Affaki, President of the Tribunal
Prof. Gary Born, Arbitrator
Prof. Vaughan Lowe, Arbitrator

Secretary of the Tribunal
Ms. Frauke Nitschke

18 January 2019

I. BACKGROUND

1. On 13 December 2018, the Tribunal issued Procedural Order No. 5, containing its decision on each outstanding issue of legal privilege that had been identified by the Parties in their Stern Schedule dated 29 November 2018.[1]

2. In Procedural Order No. 5, the Tribunal addressed the Parties' submissions on whether there is an exception to the waiver of privilege where parties have a common interest.[2] The Tribunal held that, "the onus is on GTH to demonstrate that the law applicable to privilege for each communication recognises common interest privilege *and* that the communication qualifies for common interest privilege".[3] GTH was granted leave to present evidence concerning the attachment of common interest privilege for each relevant communication, provided that it did so without delay.[4]

3. In Procedural Order No. 5, the Tribunal also noted that if the Parties sought further guidance or a determination from the Tribunal in relation to limited waivers of legal privilege, the Tribunal would require better particularised pleadings in this respect.[5] The Tribunal stated as follows:

> It is open to the Parties to provide evidence that privilege has not been waived in total or in part by such disclosure of information under the relevant applicable law in the case of each disputed communication. Such evidence can only be contemplated in relation to the rules of privilege in Canada, the United States, England and Wales, the Netherlands, and New Zealand, as the

[1] Procedural Order No. 5 sets forth in detail the procedural history relating to the Parties' various disputes over matters of legal privilege.

[2] Procedural Order No. 5, Annex A, pp. 19-20, Outstanding Issue 1, sub-question (iii) ("Waiver of attorney-client privilege through disclosure of legal advice across separate legal entities, and exceptions for common interest, if any, under each applicable law").

[3] Procedural Order No. 5, Annex A, p. 20.

[4] *Id.* The Tribunal noted that, in light of its decision that in-house counsel admitted in Egypt may not assert legal privilege, "GTH is only required to demonstrate the two-pronged qualification as concerns the attachment of common interest privilege for the relevant communications under the law of England and Wales and, separately, the law of the Netherlands and that of New Zealand".

[5] Procedural Order No. 5, Annex A, pp. 21-22, Outstanding Issue 1, sub-question (iv) ("Waiver of attorney-client privilege through disclosure of legal advice to third parties, and limited waiver protections, if any, under each applicable law").

> Tribunal has already determined that privilege rules in Egypt do not allow in-house counsel to claim privilege, let alone to claim entitlement thereto following disclosure to third persons.[6]

4. By email of 20 December 2018, the Claimant informed the Tribunal that it planned to make submissions with respect to common interest privilege and limited waiver of privilege, pursuant to Procedural Order No. 5, by 23 December 2018.

5. In its response of 21 December 2018, the Tribunal encouraged the Parties to attempt to reach an agreement in relation to common interest privilege and limited waiver of privilege. The Tribunal instructed the Parties that, if they were unable to reach such an agreement, they should agree to a briefing schedule on these issues that would not alter the date of the hearing. The Tribunal further directed the Parties to make precise submissions in the form of a Stern Schedule.

6. On 7 January 2019, the Parties informed the Tribunal that they had been unable to reach agreement on the remaining issues of legal privilege. On behalf of the Parties, the Respondent submitted the Stern Schedule containing the Parties' respective positions on these matters. In addition to their submissions on common interest privilege and limited waiver of privilege, the Parties also made submissions on subject matter waiver of privilege, and sought the Tribunal's guidance on this issue.

7. The Claimant subsequently informed the Tribunal that its supporting documentation had not been properly numbered in the Stern Schedule and filed a corrected version.

8. By email of 8 January 2019, the Tribunal acknowledged its receipt of the Parties' Stern Schedule and confirmed that it would work from the corrected version submitted by the Claimant.

[6] Procedural Order No. 5, Annex A, p. 22.

II. DECISION

9. The Tribunal decides on each issue of the three outstanding issues of privilege as stated in the final row of the Stern Schedule attached as Annex A. This Annex forms an integral part of the present Order.

On behalf of the Tribunal,

[signed]

Prof. Georges Affaki
President of the Tribunal
Date: 18 January 2019

Global Telecom Holding v. Government of Canada
Stern Schedule of Disputed Issues Regarding Common Interest Privilege And Limited Waiver of Privilege

I. Common Interest Privilege	The Tribunal stated the following on page 20 of PO5: > the onus is on GTH to demonstrate that the law applicable to privilege for each communication recognises common interest privilege and that the communication qualifies for common interest privilege. The Tribunal considers that R-294 demonstrates that Canadian law accords common interest privilege as does R-295 in relation to the United States. Given that the Tribunal has decided above that in-house counsel admitted in Egypt is not entitled to assert legal privilege in this arbitration, GTH is only required to demonstrate the two-pronged qualification as concerns the attachment of common interest privilege for the relevant communications under the law of England and Wales and, separately, the law of the Netherlands and that of New Zealand. GTH is granted leave to present such evidence to the Arbitral Tribunal but this must be done without delay. In the absence of such evidence, common interest privilege will not attach to communications involving in-house counsel admitted in England and Wales, in the Netherlands, and in New Zealand, with the result that the relevant communications must be produced without delay in accordance with PO 3.
Summary of Claimant's Position	**A. ENGLISH AND NEW ZEALAND LAW RECOGNIZE COMMON INTEREST PRIVILEGE**[7] 1. English law recognizes common interest privilege, including with respect to companies within the same group. The common interest principle has been found to apply to both heads of English legal professional privilege: litigation privilege and legal advice privilege.[8] In *The TAG Group Litigation Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) and others*, the English High Court explained that:

[7] Since receiving PO5 [redacted] See PO5, p. 17. In the circumstances, GTH will produce relevant communications previously withheld for privileged where advice is only being solicited from or rendered by Dutch lawyers.

[8] *See* **Exhibit C-445**, *Phipson on Evidence (19th Ed.)*, ¶ 24-07 ("*Common interest privilege will also apply to companies in the same group. There will often be a reporting requirement between companies in the same group as to litigation. Sometimes the parent will require briefing on the litigation which may be more in the nature of legal information than legal advice. So long as the information is confidential, which it normally will be, there should not be a problem herein claiming common interest*

	. . . where a communication is produced by or at the instance of one party for the purposes of obtaining legal advice or to assist in the conduct of litigation, then a second party that has a common interest in the subject matter of the communication or the litigation can assert a right of privilege over that communication as against a third party. **The basis for the right to assert this 'common interest privilege' must be the common interest in the confidentiality of the communication.** […] The questions of what type of relationship between the two parties can give rise to a 'common interest' in the communication concerned has been considered in a number of cases. Amongst the types of relationship that can give rise to a 'common interest' are those of insured and insurer and insurer/reinsured and reinsurer. The cases have refused to be prescriptive about the circumstances in which the two parties will have a sufficient 'common interest' in the particular communications concerned. The issue has to be decided on the facts of the individual case.[9] 2. New Zealand law similarly recognizes common interest privilege, where the interest, which can be legal or commercial, need not be identical but must be closely related.[10]

privilege. Early authorities dealt with common interest privilege as applicable to legal advice privilege but it is equally applicable to litigation privilege."). See also **Exhibit C-435**, *Berkeley Administration Incorporated v McClelland* (2 March 1994, CA), p. 8 ("*The principle applied to the common interest of two separate parties must apply with at least equal force to a single interest shared by a company and its wholly owned subsidiary jointly.*").

[9] **Exhibit C-440**, *The TAG Group Litigation Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) and others* [2006] EWHC 839 (Comm), ¶¶ 78, 80 (emphasis added).

[10] *See* **Exhibit C-443**, *Fresh Direct Ltd v J M Batten and Associates HC Auckland* [2009] NZHC 2430, ¶ 62 ("*The availability of common interest privilege in New Zealand was considered by Master Kennedy Grant in Unilateral Investments Ltd v VNZ Acquisitions Ltd [1993] 1 NZLR 468. He held that common interest privilege was available, both where litigation was anticipated or pending, and (by reference to American authorities) where it was not. He further considered that the parties entitled to the privilege must have a common interest in the subject matter of the communications in respect of which the claim was made, and that that common interest must be identical, or if not identical, then closely related. **The common interest could be either legal or commercial**.*" (emphasis added)).

	B. THE RELEVANT COMMUNICATIONS IN THIS CASE ARE PROTECTED BY COMMON INTEREST PRIVILEGE 3. GTH accepts the Tribunal's decision to apply the law of counsel's bar as the relevant determinant for questions of privilege.[11] However, GTH respectfully submits that the protections under the laws of Canada, the United States, England and Wales and New Zealand are sufficiently similar that, under any of these regimes, common interest privilege can be invoked in accordance with GTH's, and its related entities', expectations at the time of the relevant communications.[12] 4. In its letter dated 12 November 2018, GTH has explained that there was sufficient commonality of interest (*i*) between Wind Mobile and VimpelCom with respect to the sale of Wind Mobile,[13] and [redacted][14] These are the two subject areas specifically raised by Canada in its letter dated 2 November 2018.[15] As regards (*i*), Wind Mobile and VimpelCom had very obviously aligned economic interests in seeing a successful sale of Wind Mobile completed because, in light of the difficulties faced by VimpelCom's subsidiary GTH as a foreign investor in Canada, VimpelCom was keen to exit for maximum value, and Wind Mobile was keen to facilitate a sale to an investor that would not face the same issues as GTH. As part of this process, there was common interest in freely understanding and exploring all possible options facing Wind Mobile. The commonality of interest between VimpelCom, GTH and Wind Mobile is certainly enough to maintain the common interest privilege over communications of a confidential legal nature that pertain to a potential sale transaction and other options, particularly where both VimpelCom and Wind Mobile would want and expect privilege to be maintained in those communications *vis-à-vis* any potential buyers (or other third parties). There is further no suggestion that such privilege has been waived, and, in any event, neither VimpelCom nor GTH has any right to waive such privilege on behalf of Wind Mobile. As regards (*ii*), VimpelCom and GTH formed part of the ownership structure of Wind Mobile. [redacted] and of sufficient commonality of economic interest to maintain common interest privilege over communications of a legal nature that pertain to such restructurings. Both

11 *See, e.g.,* PO5, pp. 12-13.

12 *See* IBA Rules, Article 9(3)(c).

13 GTH's Letter to the Tribunal, 12 November 2018, ¶ 34(a).

14 GTH's Letter to the Tribunal, 12 November 2018, ¶ 34(b).

15 Canada's Letter to the Tribunal, 2 November 2018, p. 9.

	GTH and VimpelCom would want and expect privilege to be maintained in those communications vis-à-vis any third parties. There is no suggestion that such privilege has been waived. 5. Further, for completeness, GTH has below summarized, by reference to the Amended Privilege Log dated 22 October 2018, why relevant communications in each category of the Amended Privilege Log would be protected by common interest, due to sufficient commonality of interest and the expectation that confidentiality, and thus privilege would be maintained. In the interest of efficiency, GTH has combined categories that pertain to similar subject matter.[16] For the avoidance of doubt, we note: (*i*) that several of the documents in question might fall into one or more of the categories below;[17] and (*ii*) several documents falling into each of these categories, including with lawyers on the correspondence, have been produced to Canada. It is only where the documents are privileged that they have been withheld. In this regard, GTH is aware that certain documents shared between and amongst VimpelCom, GTH and Wind Mobile would not be subject to common interest privilege due to a lack of commonality of interest. Those documents would not have been tagged privileged and, if responsive, will have been produced. But that fact does not affect the reality that there are also certain communications (relating to the topics summarised below) between the relevant entities that are subject to common interest privilege, where legal advice is being shared amongst the entities with an expectation that the confidentiality would remain protected. Furthermore, it should be noted that for all categories, the parties claiming privilege would want and expect privilege to be maintained in those communications vis-à-vis any third parties (including when those communications were made) and there is no suggestion that such privilege has been waived. Where this is not the case, documents have been produced.[18]

[16] Categories are indicated by their Participant List number. In this regard, Claimant notes that Annex I to Canada's Positions in the Stern Schedule of Disputed Issues Regarding Claimant's Assertions of Legal Privilege, dated 29 November 2018 ("**Annex I**"), is grossly misleading. Canada has either misunderstood or is misrepresenting what the Participant Lists reveal, which are the combined participants on the communications withheld within the particular category of the privilege log. It is clearly not the case that each participant listed in a Participant List appears on every communication within the relevant category of the Amended Privilege Log, as Canada's Annex I suggests.

[17] This was explained at footnote 2 to the Amended Privilege Log, which stated that "[t]*he category description identified in the 'Category Description and Privilege Justification' column* [of the Amended Privilege Log] *identifies one relevant topic discussed in the legally privileged communication. Other topics many have also been discussed.*"

[18] In light of Canada's objections, Gibson Dunn attorneys have re-reviewed the documents referred to in the Amended Privilege Log that include Wind Mobile participants (of which there were 388). Following this review, taking into account the requirements of commonality of interest referred to in the authorities cited above and in GTH's prior submissions, 19 additional documents (including family members) will be produced to Canada. GTH maintains privilege over the remaining communications with the Wind Mobile participants.

C. COMMUNICATIONS DISCUSSING OFFERS TO PURCHASE WIND MOBILE, THE SALE OF WIND MOBILE (OR A MERGER), AND/OR THE DECISION BY GTH TO EXIT THE CANADIAN MARKET, OR TO MOVE TO CCAA (*I.E.*, LIQUIDATION) PROCEEDINGS.[19]

6. The same reasoning that applies to the sale of Wind Mobile, referred to above,[20] also applies to communications relating to offers to purchase, or a potential merger. Meanwhile, in the hostile investment environment created by Canada, GTH's only options for exiting the Canadian market were a sale of the business [redacted]. In those difficult circumstances, GTH maintains that there was a commonality of interest among GTH and its related entities (in particular, Wind Mobile and VimpelCom). All of those companies were seeking to maximize the value of the Canadian business for their respective shareholders, whether via a sale or, [redacted]. All options were considered and the companies' representatives simply sought to identify the best option. The legal advice they obtained was with respect to this commonality of interest. Of course, where commonality of interest is not present, these documents have been produced.

D. COMMUNICATIONS DISCUSSING WIND MOBILE'S PARTICIPATION IN THE 700 MHZ AUCTION.[21]

7. GTH, VimpelCom and Wind also had a common interest with respect to legal advice obtained in relation to the 700 MHz spectrum auction. The parties were assessing, among other things, the applicability of various conditions to the spectrum in question and whether to participate in the auction in the circumstances. In short, the legal advice sought in this context related to the parties' collective decision as to whether to participate in the 700 MHz Auction. Of course, where commonality of interest is not present, these documents have been produced.

E. COMMUNICATIONS DISCUSSING CANADA'S POLICIES OR ACTIONS, OR GTH'S EXPECTATIONS WITH RESPECT TO THESE, AS WELL AS ITS DIRECT INTERACTIONS WITH CANADA (*E.G.*, THE VOTING CONTROL APPLICATION AND NATIONAL SECURITY REVIEW).[22]

8. The alignment of interest here is clear: in these circumstances, GTH and its related entities were conducting communications with their lawyers where **Canada itself** was the adverse party. As regards the voting control

19 Participant Lists 10-27, 36-38, 42-44, 49-51, 60-62, 65-67, 74-76, 78-80, 92-94, 113-114, and 119-121.

20 *See* GTH's Letter to the Tribunal, 12 November 2018, ¶ 34(a).

21 Participant Lists 4-6, 28-29, 39-41, 52-53, 63-64, and 68-70.

22 Participant Lists 81-88, 97-99, 103-108, 112, 116-118, 122-125, 130-141, 150-152.

	applications specifically, GTH securing voting control of Wind Mobile was crucial to Wind Mobile receiving additional funding: the purpose of the relaxation of the Canadian ownership and controls rules was to encourage additional foreign investment. In this context, there was an obvious commonality of interest with respect to the legal advice being provided. Of course, where commonality of interest is not present, these documents have been produced. **F. COMMUNICATIONS DISCUSSING WIND MOBILE'S FUNDING/EQUITY NEEDS AND ABILITY TO REPAY ITS DEBT.[23]** 9. All parties involved wished to ensure that Wind Mobile was meeting its debt obligations. Any legal advice sought and/or obtained in this regard is with respect to that common interest. Of course, where commonality of interest is not present, these documents have been produced. **G. COMMUNICATIONS DISCUSSING THE OPPORTUNITY TO INVEST IN CANADA.[24]** 10. The relevant communications withheld for privilege are from a time when the parties were far into discussions regarding the investment, such that the issues under discussion were detailed and specific (including input from the relevant entities' legal teams). At this time, there was certainly a common interest in the confidentiality of the (limited) communications in question. Of course, where commonality of interest is not present, these documents have been produced. **H. COMMUNICATIONS DISCUSSING GTH'S/WIND MOBILE'S BUSINESS PLANS.[25]** 11. There was sufficient commonality of interest with respect to these communications because, as in any group of companies, the legal aspects of VimpelCom's, GTH's and Wind Mobile's business plans were relevant to all entities as it related to the future of Wind Mobile. Of course, where commonality of interest is not present, these documents have been produced. **I. COMMUNICATIONS DISCUSSING THE IMPACT OF TECHNOLOGICAL CHANGE ON WIND MOBILE'S BUSINESS.[26]**

[23] Participant Lists 30-35, 71-73, and 145-149.

[24] Participant Lists 77, and 129.

[25] Participant Lists 89-91, 95-96, and 142-144.

[26] Participant Lists 100-102, and 126-128.

12. Similar to the business plans referred to above, GTH and its related entities clearly had a common interest in assessing and mitigating/taking advantage of technological changes so as to improve Wind Mobile's business. Accordingly, any legal advice concerning the impact of technological changes on the business is subject to common interest privilege. Of course, where commonality of interest is not present, these documents have been produced.

J. COMMUNICATIONS DISCUSSING NEGOTIATIONS OF ROAMING AND TOWER/SITE SHARING AGREEMENTS.[27]

13. With respect to these communications there was a commonality of interest, with the potential counterparties to the tower/site sharing agreements being the 'adverse' parties in such circumstances. Securing such agreements, and the negotiation of them, was in the common interest of VimpelCom, GTH and Wind Mobile. Of course, where commonality of interest is not present, these documents have been produced.

K. COMMUNICATIONS DISCUSSING THE MOVE OF GTH'S [redacted] PLACE OF OPERATIONS FROM CAIRO TO AMSTERDAM.[28]

14. The participants on the relevant communications withheld in the Amended Privilege Log are GTH and VimpelCom employees. VimpelCom and GTH formed part the same group of companies [redacted] benefits both parties because it secures the ongoing success of the business, which, at the time, was largely being funded by VimpelCom. [redacted] Again, this evidences a commonality of economic interest to maintain common interest privilege over communications of a legal nature that pertain to the restructuring. Of course, where commonality of interest is not present, these documents have been produced.

L. COMMUNICATIONS DISCUSSING AAL'S LIQUIDITY RIGHTS AND THE EXIT NOTICE UNDER THE AMENDED AND RESTATED SHAREHOLDER AGREEMENT.[29]

15. Insofar as these communications include representatives of GTH and VimpelCom only, there is a clear common interest in the contractual rights under the Amended and Restated Shareholder Agreement: GTH and VimpelCom

[27] Participant Lists 109-111.

[28] Participant List 153.

[29] Participant Lists 1-3, 7-9, 46-48, and 55-59

	have, essentially, an identical interest in the contract. Of course, where commonality of interest is not present, these documents have been produced. **M. COMMUNICATIONS DISCUSSING VIMPELCOM'S DECISION TO IMPAIR THE VALUE OF ITS CANADIAN ASSETS, AND/OR THE DECISION TO REDUCE OR CEASE FUNDING OF WIND MOBILE.**[30] 16. Where GTH and Wind were involved in legal aspects of the discussions regarding the decision to impair the value of VimpelCom's investment (or reduce its funding), this was to keep them updated on developments with respect to the funding of the Canadian business. There was certainly no adversity of interest with respect to these communications, the substance of which displays a commonality of interest in the confidentiality of the discussions within the group of companies. Of course, where commonality of interest is not present, these documents have been produced. In addition to GTH's prior submissions, Procedural Order No. 5 and the IBA Rules, the Tribunal may refer to the following authorities: **Exhibit C-445**, *Phipson on Evidence (19th Ed.)*, ¶ 24-07. **Exhibit C-435**, *Berkeley Administration Incorporated v McClelland* (2 March 1994, CA), p. 8. **Exhibit C-440**, *The TAG Group Litigation Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) and others* [2006] EWHC 839 (Comm), ¶¶ 78, 80. **Exhibit C-443**, *Fresh Direct Ltd v J M Batten and Associates HC Auckland* [2009] NZHC 2430, ¶ 62.
Summary of Canada's Position	1. Canada takes note of GTH's representation that [redacted] The Respondent thus understands that GTH will not rely on any legal impediment or privilege under the legal or ethical rules of The Netherlands to withhold information in this arbitration. With respect to the Claimant's statement that "GTH will produce relevant communications previously withheld for privileged that **only** include said Dutch lawyers", Canada does not agree that for privilege to attach, it sufficient for a counsel from another jurisdiction to be copied. 2. At page 22 of Procedural Order No. 5 the Tribunal provided the following general guidance: "outside the sharing of information amongst counsel, which is deemed to safeguard the initial legal privilege (assuming such a privilege attached in the first place), and save for specific statutory exceptions or exceptions derived from case

[30] Participant Lists 45 and 54.

	law that similarly allow legal privilege to persist if the information is disclosed only to a specifically-identified category of recipients such as auditors,[footnote omitted] the Tribunal is reluctant to uphold privilege when the shared information is no longer confined to the confidence of the attorney/solicitor-client relationship." As the Tribunal observed, a fundamental component of privilege is confidentiality. The communications over which the Claimant claims privilege appear to have been widely shared not only internally within a corporate entity, but across various corporate entities and shared with third parties. As a general rule, such broad disclosure of information is inconsistent with a claim of confidentiality and the Tribunal should conclude that privilege over such communications was lost. 3. Common interest privilege pre-supposes a communication that is privileged in the first place, namely, a communication between lawyer and client that is confidential and made for the purpose of seeking or obtaining legal advice.[31] Many of the communications that were shared amongst VimpelCom, GTH, Wind Mobile and other related corporate entities do not obviously constitute communications between counsel, or communications between counsel and clients with a common interest for the purpose of sharing legal advice. 4. With respect to the first part of the two-pronged analysis set out in page 20 of PO5, Canada does not challenge GTH's contention that English and New Zealand law recognize that legal advice can be shared between parties, having a sufficient common interest in the particular communications being shared, without losing privilege.[32] 5. The Claimant has not however established that under the laws of Canada, England, the US and New Zealand, common interest privilege would also extend to discussions and commentary amongst clients within the parties sharing a common interest regarding the legal advice that was shared. Yet, the Claimant appears to have extended its claim of privilege to such communications. 6. With respect to the second part of the test, GTH has not discharged its burden of demonstrating that the categories of communications it describes qualify for common interest privilege under the applicable law. The common interest claim must be specifically considered in light of the subject matter of the communication and it must exist at the time the privileged communication is shared.

[31] Heightened scrutiny should be applied to the communications to and from in-house counsel because in-house counsel regularly communicate on business rather than legal matters. On the application of a presumption that when in-house counsel is involved in a communication, the in-house attorneys' input is business in nature. See, e.g., **R-304**, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, et al., 230 F.R.D. 398* ("*Neuberger*"), at 411 n.20; **R-321**, *Kincaid v. Wells Fargo Sec., LLC*, No. 10-CV-808-JHP-PJC, 2012 WL 712111, at *2 (N.D. Okla. Mar. 1, 2012).

[32] Canada notes that the Tribunal did not address in PO5 the implication of the fact that New York, the state of call to the bar of some of the in-house counsel, does not recognize common interest privilege.

	7. Importantly, the Claimant has failed to establish that the clients amongst whom the privileged communication was circulated shared a common interest in the subject matter of the communication. 8. It is insufficient in this regard for the Claimant to rely on common ownership or control between the clients. Parties cannot simply rely blindly on the affiliation of the various entities' in asserting a common interest.[33] This is particularly the case here as VimpelCom did not wholly own GTH or Wind Mobile, either directly or indirectly, and neither VimpelCom nor GTH had control over Wind Mobile. 9. Extending the attorney-client privilege to related corporations merely because they are affiliated violates the theory of entity separateness. In *Teleglobe*, the Court commented on the common interest privilege and noted: > [T]he community-of-interest privilege only applies when those separate attorneys disclose information to one another, not when parties communicate directly. Id. Finally, it assumes too much to think that members of a corporate family necessarily have a substantially similar legal interest (as they must for the community-of-interest privilege to apply, see id.) in all of each other's communications. Thus, holding that parents and subsidiaries may freely share documents without implicating the disclosure rule because of a deemed community of interest stretches, we believe, the community-of-interest privilege too far.[34] 10. Further, the Claimant has not provided any evidence that the legal advice shared amongst GTH, VimpelCom and Wind Mobile was accompanied by any cautionary statements indicating that the advice was confidential and privileged, that it should be treated with confidence and not be circulated any further, and that it was provided expressly without waiver of privilege. 11. Finally, the Claimant now acknowledges that "certain documents shared between and amongst VimpelCom, GTH and Wind Mobile would not be subject to common interest privilege due to a lack of commonality of

[33] Courts in the United States have rejected the notion that attorney client privilege necessarily applied to documents shared between a parent and subsidiary corporation. In *Bowne, Inc. v. AmBase Corp*., a parent corporation shared privileged documents with a subsidiary. The Court held that this breach of confidentiality destroyed the documents' attorney-client privilege protection, because the parent and subsidiary lacked a common interest. **R-322**, *Bowne of New York City, Inc. v. AmBase Corp*., 150 F.R.D. 465, 491 (S.D. N.Y. 1993), ¶ 37. In *Neuberger Berman*, the Court stated that where there is a non-controlling financial relationship between the entities, "[t]his type of ownership interest does not establish a joint or common interest for purposes of privilege." The Court held that while the various entities involved "may have chosen to ignore their separate legal identities and share information across and among legally distinct entities, the law of privilege does not." **R-304**, *Neuberger*, at page 17 and footnote 23.

[34] **R-295**, *Teleglobe USA Inc v. BCE Inc* (2007) US Court of Appeal, Third Circuit, 06-2915, p. 56.

interest" and that such documents should be produced to Canada. However, no further details or explanation were provided as to how this determination was made, and in light of the Claimant's production to date and the allegations of common interest set out by the Claimant above, it is clear that there remains significant disagreement between the Parties in this respect.

12. With respect to Claimant's explanations regarding the different categories of documents over which privilege has been claimed, Canada notes as a general point that the explanations relate to broad categories of documents. Not only has the Claimant failed to consider whether a common legal interest existed in the context of each communication but as more fully addressed below, the claims of common interest are unsubstantiated:

A. GTH HAS NOT DEMONSTRATED THAT WIND MOBILE AND VIMPELCOM SHARE A SUFFICIENT COMMON INTEREST WITH RESPECT TO THE SALE OF WIND MOBILE (OR A MERGER), AND/OR THE DECISION BY GTH TO EXIT THE CANADIAN MARKET, [redacted]

13. VimpelCom's interest in "exiting the Canadian market for "maximum value" was not necessarily in Wind Mobile's interest. [redacted]

14. [redacted]

[35] **R-323**, Memorandum from Andy Dry and Carsten Revsbech to Jo Lunder (Jan. 29, 2013).

15. Canada also disputes GTH's unsubstantiated assertion that "VimpelCom and Wind Mobile would want and expect privilege to be maintained in those communications". [redacted]

16. Finally, although it has no direct bearing on the application of common interest privilege, Canada disputes GTH's assertion that the "difficulties" it faced during the ICA review process influenced its decision to exit the Canadian market. Evidence shows on the contrary that GTH's decision was made up prior to the initiation of the national security review under the ICA in January 2013.

B. GTH HAS NOT DEMONSTRATED THAT GTH AND VIMPELCOM SHARE A SUFFICIENT COMMON INTEREST WITH RESPECT TO THE RESTRUCTURING OF WIND MOBILE [redacted]

17. Contrary to GTH's assertion, it is far from obvious that VimpelCom, GTH and Wind Mobile had a common interest [redacted]. While VimpelCom may have benefitted from these losses the Claimant has not demonstrated how the other companies would have shared in the benefits. VimpelCom cannot assume that what benefits its interests similarly benefits other companies, especially since it did not wholly own GTH and Wind Mobile.

C. GTH HAS NOT DEMONSTRATED THAT GTH, VIMPELCOM AND WIND MOBILE SHARE A SUFFICIENT COMMON INTEREST IN WIND MOBILE'S PARTICIPATION IN THE 700 MHZ AUCTION

18. The acquisition of additional spectrum through the 700MHz spectrum auction was an important part of Wind Mobile's business plan 2014-2023[36] as it was necessary for the full deployment of LTE wireless services which was important to Wind Mobile's future viability as a wireless service provider as all wireless service suppliers were upgrading from 3G to LTE technology.

19. VimpelCom's decision not to fund Wind Mobile's participation in the 700 MHz auction was entirely based on VimpelCom's self-interest in limiting funding of Wind Mobile. It was not in Wind Mobile's interest as it significantly impacted its ability to continue to provide wireless telecommunications coverage in Canada.

[36] **R-324**, Wind Canada 2014-2023 Business Plan/Business Review (Oct. 28, 2013).

20. The Claimant incorrectly states that "common interest with respect to legal advice obtained" is sufficient to sustain a claim of privilege notwithstanding its communication to a third party. The relevant test is not whether the entities had "a common interest with respect to the legal advice obtained" but rather a common interest with respect to the issue underlying the communication which requires in this case a common interest with respect to participation in the 700 MHz auction. Where the parties lacked a common interest over the outcome of the transaction, it is irrelevant whether they each had an interest in receiving legal advice on the transaction.

D. GTH HAS NOT DEMONSTRATED THAT GTH, VIMPELCOM AND WIND MOBILE SHARED A SUFFICIENT COMMON INTEREST WITH RESPECT TO CANADA'S POLICIES OR ACTIONS, OR GTH'S EXPECTATIONS WITH RESPECT TO THESE, AS WELL AS ITS DIRECT INTERACTIONS WITH CANADA (E.G. THE VOTING CONTROL APPLICATION AND NATIONAL SECURITY REVIEW)

21. Canada does not contest that VimpelCom and GTH may have broadly shared a common interest with respect to this subject matter. However, Canada disputes that VimpelCom or GTH shared a common interest over these matters with Wind Mobile. Contrary to GTH's assertion, their alignment of interests is far from clear.

22. As the new entrant that had managed to attract the largest number of subscribers Wind Mobile was well placed to benefit from the Government of Canada's initiatives aimed at fostering more competition in the Canadian wireless market, including the Transfer Framework.

23. Documents produced by GTH in response to Canada's document requests show that in June 2013 Wind Mobile's Chairman and Chief Executive Officer, Mr. Lacavera, was quoted in Canadian media as expressing support for the government's policies and actions. Not long after Mr. Lacavera's statements were reported in the press VimpelCom's in-house lawyer wrote a letter to Mr. Lacavera chastising his statements and to "reserve its rights" in connection with those statements. Mr. Lacavera's outside counsel responded by stating that his client had "no particular basis to determine whether speaking in favour of the Government's commitment to a fourth carrier in every region, which is a commitment that on its face is favourable to Wind Mobile, is helpful or detrimental in regards to VimpelCom's *Investment Canada Act* process." Mr. Lacavera's counsel went on to state: "Furthermore [Mr. Lacavera's] understanding is that the delay in approval appears related entirely to national security matters regarding VimpelCom's ownership, so it is difficult to see why any statement concerning the viability of a fourth carrier in every region is relevant, let alone detrimental, to such approval."[37]

[37] **R-325**, VimpelCom Letter to Anthony Lacavera from Felix Saratovsky (Jun. 6, 2013); **R-326**, Letter to Felix Saratovsky from Kevin Rooney (Jun. 10, 2013); **R-327**, Letter to Kevin Rooney from John Andrew (Jun. 14, 2013).

	The Claimant's assertion that there was a common interest appears to be inconsistent with these documents and with the Claimant's allegations in this case.[38] 24. The Claimant alleges that "securing voting control of Wind Mobile was crucial to Wind Mobile receiving additional funding" and therefore that there was a commonality of interest. However this is contradicted by the evidence. VimpelCom and GTH's interest in the voting control application was clearly to gain control in order to sell Wind Mobile for the maximum price, which according to their claims, meant selling Wind Mobile to an Incumbent. This was not in Wind Mobile's interests. Wind Mobile sought to compete against the Incumbents and even identified itself as a "fourth player". If an Incumbent purchased Wind, an Incumbent may have reduced Wind's role in the telecommunications marketplace and simply sat on its spectrum. This was not in Wind Mobile's interests. Thus Wind and GTH/Vimpelcom lacked commonality of interest in the voting control application. Had GTH/Vimpelcom intended to acquire control in order to stay invested in Wind Mobile, the entities may have had commonality of interests. But those are not the circumstances that existed. 25. Lastly, the Claimant's suggestion that "Canada itself was the adverse party" is not relevant for the purposes of whether common interest privilege protects information disclosed to separate entities. The test is whether those entities shared a common interest. In any case, GTH's argument that GTH and Wind Mobile had a commonality of interest vis-à-vis Canada is contradicted by the Claimant's own allegations that Canada sought to support Wind Mobile at the expense of GTH.[39] **E. GTH HAS NOT DEMONSTRATED THAT GTH, VIMPELCOM AND WIND SHARE A SUFFICIENT COMMON INTEREST IN WIND MOBILE'S FUNDING/EQUITY NEEDS AND ABILITY TO REPAY ITS DEBT.** 26. Canada does not agree that there is common interest over this broad category of documents. VimpelCom was trying to minimize funding to Wind Mobile and ensure priority of its debt repayment over others including GTH, and Wind Mobile was trying to ensure that it had sufficient funding to operate as a wireless service provider. **F. GTH HAS NOT DEMONSTRATED THAT GTH AND WIND MOBILE SHARE A SUFFICIENT COMMON INTEREST IN GTH'S DECISION TO INVEST IN CANADA**

[38] Claimant's Memorial on the Merits and Damages, ¶ 26.

[39] Claimant's Memorial on the Merits and Damages, ¶ 26.

	27. GTH's attempt to withhold this category of documents impermissibly stretches the meaning of "common interest". Globalive was clearly interested in convincing GTH to invest in Canada and partner with it in the context of the auction. GTH would have been interested in maximizing its own individual interest in the business negotiation and minimizing its risk exposure. Legal advice shared amongst these entities in that context would not be privileged except perhaps to the limited extent that it related to joint participation in the auction. More general discussion about the applicable legal framework in Canada would not be privileged. **G. GTH HAS NOT DEMONSTRATED THAT GTH, VIMPELCOM AND WIND MOBILE SHARE A SUFFICIENT COMMON INTEREST IN GTH'S/WIND MOBILE'S BUSINESS PLANS.** 28. GTH appears to assume that entities in a corporate group necessarily share a common interest over a subsidiary's business plans. This assumption is incorrect, especially in cases where the related company, such as Wind Mobile, is not owned or controlled by the other companies in the group, let alone wholly owned. 29. The category is too broad to conclude that there is a common interest in relation to legal advice falling within this category and in respect of the entire time period. As explained above, after VimpelCom's acquisition of Wind Mobile, interests were not aligned as VimpelCom was seeking to exit the Canadian market for maximum value and minimize funding, while Wind Mobile was trying to establish itself as a fourth player in the market and ensure it was sufficiently funded to do so. **H. GTH HAS NOT DEMONSTRATED THAT GTH, VIMPELCOM AND WIND MOBILE SHARE A SUFFICIENT COMMON INTEREST IN THE IMPACT OF TECHNOLOGICAL CHANGE ON WIND MOBILE'S BUSINESS.** 30. Canada questions whether communications related to this subject matter constitute legal advice in the first place. Assuming that is indeed the case, Canada disputes that GTH, VimpelCom and Wind Mobile had a common interest in the impact on technological change on Wind Mobile's business for the same reasons as those set out in response to the previous category of documents. **I. COMMUNICATIONS DISCUSSING NEGOTIATIONS OF ROAMING AND TOWER/SITE SHARING AGREEMENTS.** 31. Canada does not object to the extent that these communications constitute legal advice, are privileged further to the Tribunal's determination regarding in-house counsel and that the applicable laws recognize common interest privilege in respect of such communications.

	J. GTH HAS NOT DEMONSTRATED THAT GTH AND VIMPELCOM SHARE A SUFFICIENT COMMON INTEREST IN THE MOVE OF GTH'S PLACE OF OPERATIONS FROM CAIRO TO AMSTERDAM. 32. GTH appears to assume that its interests align with VimpelCom because of the fact that it is its controlling shareholder. GTH, as a separate corporate entity had its own interests that were distinct from those of its parents in relation to place of operation and management in compliance with Egyptian law. As a result of VimpelCom's acquisition of a controlling interest in GTH in 2011, it had already moved much of GTH's operations to Amsterdam, divested GTH's telecommunications assets, reduced its number of employees and left GTH as a shell of its former self. Such actions are hardly evidence of a common interest. There is no reason why GTH's Egyptian Board of Director Members, its Egyptian shareholders, or its employees would have welcomed the further steps to move all operations to Amsterdam in 2015. **K. COMMUNICATIONS DISCUSSING AAL'S LIQUIDITY RIGHTS AND THE EXIT NOTICE UNDER THE AMENDED AND RESTATED SHAREHOLDER AGREEMENT.** 33. Canada does not object to the extent that these communications constitute legal advice, are privileged further to the Tribunal's determination regarding in-house counsel and that the applicable laws recognize common interest privilege in respect of such communications. **L. GTH HAS NOT DEMONSTRATED THAT GTH, VIMPELCOM AND WIND MOBILE SHARE A SUFFICIENT COMMON INTEREST IN THE IMPAIRMENT OF THE VALUE OF VIMPELCOM'S CANADIAN ASSETS, AND/OR THE DECISION TO REDUCE OR CEASE FUNDING WIND MOBILE.** 34. The Claimant attempts to justify its common interest claim by claiming that it had to keep Wind Mobile updated on developments related to funding and impairment of assets. Doing so does not require sharing legal advice. Canada questions whether communications falling within this category is privileged in the first place. Further, for the same reasons as explained above, Canada does not agree that there was common interest between Wind Mobile and GTH/VimpelCom with respect to the impairment of Canadian assets.
Guidance or Order from the Tribunal	At the outset, the Tribunal will make the following general remarks:

	– The IBA Rules on the Taking of Evidence in International Arbitration, applicable in this arbitration[40] (the **IBA Rules**), require a party to which a request to produce documents is addressed, consensually to produce the requested documents that are in its possession, custody or control or, in the case of an objection, as ordered by the Tribunal. In this arbitration, the Tribunal has decided on the parties' respective document production requests in Procedural Order No. 3 (**PO 3**). It is only where a party that was ordered to produce documents evidences one of the reasons for exclusion from evidence or production set out in article 9(2) of the IBA Rules in relation to a particular document that the Tribunal may be petitioned to order that exclusion. The onus of evidencing a cause for exclusion as an exception to the disclosure rule pursuant to the document production order therefore lies on the party ordered to produce the documents.[41] Any inversion of the burden of proof would defeat the purpose of the IBA Rules. For the purpose of this Order, GTH is seeking the exclusion of categories of documents the production of which it was ordered to make pursuant to PO 3. GTH therefore has the onus to establish a cause for exclusion pursuant to article 9(2) of the IBA Rules. Failing a timely and full production without evidencing a satisfactory reason for exclusion may result in the application of article 9(5) *et seq.* of the IBA Rules where a reasoned application is made to that effect. – In Procedural Order No. 5 (**PO 5**), the Tribunal accepted the Parties' submissions that the laws in the United States and in Canada recognize common interest privilege.[42] The Tribunal dismissed GTH's claim that in-house counsel admitted in Egypt is entitled to assert legal privilege. In its submissions

[40] Procedural Order No. 1, § 1.4.

[41] RL-248, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Decision on Parties' Requests for Production of Documents Withheld on the Grounds of Privilege, 17 November 2005 ("*Glamis*"), § 23.

[42] Canada's suggestion in footnote 26 above that New York law might be different from the law on common interest privilege in the rest of the United States as stated in the authority that Canada adduced in R-295 is belated, insufficiently substantiated, and contradicts the reference by the US Court of Appeals to the Third Circuit to the Restatement (Third) of the Law Governing Lawyers indicating: "*According to the Restatement, the community-of-interest privilege has completely replaced the old joint-defense privilege for information sharing among clients with different attorneys. Thus, courts should no longer purport to apply the joint-defense privilege.*" (R-295, *Teleglobe USA Inc v. BCE Inc* (2007) US Court of Appeal, Third Circuit, 06-2915, footnote 20, and p. 37.) See also R-294 where the Federal Court of Appeal notes that common interest privilege "*is strongly implanted in Canadian law and indeed around the common-law world*" (R-294, *Iggillis Holdings Inc v Canada (Minister of National Revenue),* 2018 FCA 51 (FCA), § 40), and R-248 where the Tribunal identified a general consensus amongst US courts "*in defining what the parties would reasonably expect to apply in this situation.*" (R-248*, Glamis*, § 20).

	for the purpose of this Procedural Order No. 6, GTH stated its intent to produce relevant documents previously withheld on the ground of legal privilege asserted by Dutch in-house counsel.[43] This Order therefore need only determine whether the law of England and Wales and the law of New Zealand recognize common interest privilege as a principle before reviewing each category of documents over which common interest privilege is claimed. – In paragraphs 1 and 2 of its submissions in this Schedule, GTH argued that English and New Zealand law recognize common interest privilege and adduced relevant authorities to corroborate its submissions.[44] Canada accepts GTH's submission "*that English and New Zealand law recognize that legal advice can be shared between parties, having a sufficient common interest in the particular communications being shared, without losing privilege.*"[45] Therefore, this Tribunal need not rule on the entitlement of GTH to assert common interest privilege under the laws in England and in New Zealand given that Section A of GTH's submissions in this Schedule is now accepted by the Parties, but will decide on whether the conditions for common interest privilege are met in the facts of the case as evidenced. – The Tribunal does not accept GTH's submission that the protections under the laws of Canada, the United States, England and Wales and New Zealand are sufficiently similar as to warrant an identical treatment of common interest privilege regardless of which law applies. GTH had previously pleaded a similar unique standard argument when arguing the existence of a most favored nation approach to legal privilege that would apply to the communications of all in-house counsel asserting legal privilege, regardless of their bar of call or of the law otherwise applicable to the communication giving rise to the privilege claim.[46] The Tribunal had declined to follow GTH in its argument and ruled in PO 5 that legal privilege should be determined pursuant to the law of the jurisdiction with the

[43] Footnote 1 above.

[44] *See, e.g.*, C-445, *Phipson on Evidence* (19th Ed.), § 24-07 and C-443, *Fresh Direct Ltd v J M Batten and Associates HC Auckland* [2009] NZHC 2430, § 62.

[45] Canada's submission in this Schedule, § 4.

[46] PO 5, p. 10.

	closest connection to the communication over which privilege is claimed, that is, the jurisdiction of the bar of call of counsel who is asserting the legal privilege said to attach to the disputed communication, subject to evidencing that, in the particular circumstances in hand, another national law presents a manifestly closer connection with the situation, whereupon that law shall apply.[47] – As a final preliminary remark, PO 5 and this Order should be seen as complementary, with this Order in effect expanding PO 5. Where necessary, relevant paragraphs in PO 5 may be used for guidance in the application of this Order. Both Parties accept that the relevant jurisdictions, namely Canada, the United States, England, and New Zealand, "*recognize an exception to the waiver of privilege where parties have a common interest in the outcome of litigation proceedings or a commercial transaction*", and that this exception only applies between parties with a commonality of interest.[48] However, they differ in whether Wind Mobile, VimpelCom, and GTH have "*sufficient commonality of interest*" as GTH claims[49] or rather interests that "*were not aligned*" as Canada submits.[50] Specifically, Canada cites two situations that allegedly show that the parties' interests were not aligned. First, with respect to the sale of Wind Mobile, VimpelCom and Wind Mobile had different counsel and distinct interests. [redacted] GTH disagrees with Canada's claims in relation to those two situations. Concerning the sale, GTH argues that Wind Mobile and VimpelCom had aligned interests in getting the maximum value to VimpelCom and a new investor for Wind Mobile that would not face the same obstacles as GTH. According to GTH,

[47] PO 5, p. 14.

[48] Canada's Submission, 2 November 2018, p. 9; GTH's submission in this Schedule.

[49] GTH's submission in § 4 above.

[50] Canada's Submission, 2 November 2018, p. 9.

[51] *Ibid.*

	this commonality of interest between VimpelCom, GTH and Wind Mobile is sufficient to maintain the common interest privilege. Concerning the ownership restructuring of Wind Mobile, [redacted] thus showing sufficient commonality of economic interest to maintain common interest privilege over legal communications that pertain to such restructurings. In this Schedule, GTH has combined in 11 similar subject-matter categories of relevant communications (numbered C to M) listed in the Amended Privilege Log that GTH claims to be protected by common interest.[52] The Tribunal has reviewed the Parties' arguments and evidence in relation to each of those categories and decides as follows: 1. The Tribunal accepts that a communication that was created as a legally privileged communication,[53] namely a communication between lawyer and client for the purpose of seeking or obtaining legal advice, remains privileged when shared with: – a party represented by the same lawyer, or – a party represented by another lawyer, but where that party is part of the same litigation, as ascertained at the time when the privileged communication is shared.[54] 2. In addition to the two situations outlined in paragraph 1 above, a third situation involves parties forming part of the ownership structure of an entity. The question that arises is whether those parties may be presumed to have sufficient commonality of interest so as to allow the initial privilege attaching to a document not to be defeated when that document is shared amongst those parties. The Tribunal considers that the question should be decided on the merits of the facts of each case. To that

[52] In response to GTH's 11 categories, Canada has listed 12 categories. The Tribunal's decision below follows Canada's structure.

[53] See in particular the Tribunal's guidance in PO 5, p. 28, citing approvingly the four prerequisites in *Gallo* for the application of legal privilege (RL-251, *Vito G. Gallo v. The Government of Canada* (UNCITRAL) Procedural Order No. 3, 8 April 2009 ("*Gallo*"), § 47).

[54] C-445, *Phipson on Evidence* (19th Ed.), § 24-08.

	end, while no irrebuttable presumption applicable to all instances can be upheld,[55] the Tribunal accepts GTH's submission that, when working towards the sale of GTH's stake in Wind Mobile, GTH, Wind Mobile and VimpelCom may be presumed to have an aligned economic interest in the result of the sale. No contrary evidence is established by Canada at this stage.[56] [redacted] In both of those situations, the Tribunal considers that privilege is not defeated by the sharing between GTH, Wind Mobile and VimpelCom, as parties to the same ownership structure, of a document that was created as a privileged document as further provided in PO 5,[57] unless Canada establishes conflicting interests between the sharing parties so as to rebut the presumption that the Tribunal upholds in this paragraph based on GTH's affirmative assertion that it has conducted further review and produced all responsive documents.[58] In the same vein, had it been petitioned to that effect, the Tribunal would have viewed with favour an application to uphold a similar presumption in favour of allowing privilege to subsist where the relevant privileged document is circulated between the different government agencies that are involved in the same project.[59] 3. The Tribunal notes the unqualified affirmative statement by counsel for GTH that they have re-examined the withheld documents in light of the directions given by the Tribunal and that, in relation to each Category (C) to (M), GTH has produced responsive documents where privilege is not defeated by the circulation of such documents.[60] The Tribunal adds that, in resisting production on

[55] And therefore this Tribunal does not uphold "*blindly*" a rule of reliance on common interest privilege wherever there is common ownership or control, as Canada rightly points out in paragraph 8 of its submission in this Schedule above.

[56] In fact, R-304 cited by Canada suggest that "*common ownership or control*" is a safe harbor to uphold the common interest doctrine (See R-304, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B, et al.,* 230 F.R.D. 398 at 15). The control of Wind Mobile by GTH and, indirectly by VimpelCom, is therefore "*de jure*" as stated in R-304.

[57] PO 5, p. 28, and the reference to the four prerequisites in *Gallo* for the application of legal privilege (RL-251, *Gallo*, § 47).

[58] GTH's submission in § 5 and footnote 12 in this Schedule.

[59] RL-248, *Glamis*, § 24.

[60] See the closing statement of each of the following paragraphs in GTH's submission in this Schedule: 6 in relation to Category C, 7 in relation to Category D, 8 in relation to Category E, 9 in relation to Category F, 10 in relation to Category G, 11 in relation to Category H, 12 in relation to Category I, 13 in relation to Category J, 14 in relation to Category K, 15 in relation to Category L, and 16 in relation to Category M.

	the ground of article 9(2) of the IBA Rules, GTH is expected to have verified that each withheld document strictly meets the four prerequisites in *Gallo* cited in PO 5.[61] In addition, GTH is expected to have verified that the circulation of each of those privileged documents occurred (i) between parties that are part of the ownership structure of Wind Mobile (ii) for the purpose of either *(a)* the sale of that company or [redacted] whereupon the commonality of interest may be presumed in such circumstances subject to Canada's evidencing the contrary. Where any of those criteria is not satisfied, GTH shall produce the document forthwith. For the avoidance of doubt, in the hypothetical event that GTH finds, or Canada evidences, in a particular situation that only GTH and VimpelCom, but not Wind Mobile, had an aligned interest, the sharing of privileged documents between those three parties can no longer benefit of the common interest doctrine which, as an exception to the waiver rule, should be construed restrictively. 4. Canada's claim in paragraph 2 of its submission above that communications over which GTH asserts common interest privilege "*appear to* [have been] *shared with third parties*", while insufficiently particularized, calls for the following guidance from the Tribunal: privileged communications shared with third parties that are neither represented by the same lawyer, nor parties to the same litigation, nor part of the same ownership structure of an entity, cannot benefit from the presumption of the continuation of the legal privilege. Absent submission of satisfactory evidence by GTH, in relation to each withheld communication, that the initial legal privilege is not defeated by the sharing of the communication with third parties, GTH must produce those communications forthwith in compliance with PO 3. 5. Turning now to each of the categories of documents over which GTH asserts common interest privilege, the Tribunal decides as follows: 5.1 Communications discussing offers to purchase Wind Mobile, the sale of Wind Mobile (or a merger), and/or the decision by GTH to exit the Canadian market, or to move to CCAA (*i.e.*, liquidation) proceedings:

[61] PO 5, p. 28.

	Without in any way expressing a view on GTH's contention of a "*hostile investment environment created by Canada*", which would be rather premature at this stage of the proceedings, the Tribunal agrees that there was a commonality of interest among GTH, Wind Mobile and VimpelCom. Legal advice that those three entities would have obtained in respect of the sale of Wind Mobile or its liquidation would as a result be covered by the commonality of interest privilege. Canada's reference to potential redundancies in the event that Wind Mobile is sold to one of the incumbents is speculative and insufficient to establish conflicting interests between those three entities of the same group involved in the same project. In reaching this decision, the Tribunal also relies on Counsel for GTH's unqualified assertion that where commonality of interest is not present, these documents have been produced.[62] [redacted] The Tribunal has decided in paragraph 2 above that the fact that GTH and VimpelCom are part of the ownership structure of Wind Mobile and that the three entities are working together on this project permits to assume a commonality of interest in relation to legal advice shared between those entities in the matter of the company's restructuring. GTH's claim for common interest privilege over this category of documents is upheld. 5.3 Communications discussing Wind Mobile's participation in the 700 MHz Auction: The Tribunal agrees with Canada that GTH does not evidence common interest between Wind Mobile, GTH and VimpelCom with respect to their participation in the 700 MHz auction. An interest in sharing a legal advice is not sufficient evidence of a common interest in the outcome of the transaction underlying the legal advice. GTH's claim for common interest privilege on this category is therefore dismissed. The relevant documents must be produced forthwith.

[62] GTH's submission at § 6 above.

	5.4 Communications discussing Canada's policies or actions, or GTH's expectations with respect to these, as well as its direct interactions with Canada (*e.g.*, the voting control application and national security review): The exchange between VimpelCom's Legal Department and Wind Mobile's management cited by Canada in paragraph 23 of its submission above casts a serious doubt on GTH's claim of an aligned interest between GTH and VimpelCom on the one hand and Wind Mobile on the other hand. The fact that those entities might have considered Canada to be "*the adverse party*" as GTH claims has no bearing on GTH's duty to establish the alleged commonality of interest which is neither obvious nor clear contrary to GTH's submission. Absent sufficient evidence, GTH's claim for common interest privilege on this category is dismissed. The relevant documents must be produced forthwith. 5.5 Communications discussing Wind Mobile's funding/equity needs and ability to repay its debt: GTH fails to adduce convincing evidence of a commonality of interest between GTH, VimpelCom and Wind Mobile over this broad category of documents. GTH's claim for common interest privilege on this category is dismissed. The relevant documents must be produced forthwith. 5.6 Communications discussing the opportunity to invest in Canada: Canada accepts that legal advice shared amongst Globalive, GTH, VimpelCom and Wind Mobile in relation to GTH's investment in Canada remains privileged to the extent that it related to joint participation in the auction. The Tribunal need not therefore decide on this category, but agrees with Canada that documents containing a more general discussion about the applicable legal framework in Canada would not be privileged and have to be produced forthwith. 5.7 Communications discussing GTH's/Wind Mobile's business plans: The Tribunal has difficulty in accepting a business plan as a legally privileged document meeting the *Gallo* four prerequisites, if only because business plans are seldom drafted by a lawyer acting in her capacity as a lawyer. As a result, the sharing of those business plans amongst GTH, VimpelCom and Wind Mobile cannot create a legal privilege of its own where no such privilege attached in the first

	place. Absent evidence by GTH that each of the withheld business plans was created initially as a privileged document under the law applicable to it, GTH's claim for common interest privilege on this category has to be dismissed. Legal advice in relation to a business plan does not make the business plan a privileged document. 5.8 Communications discussing the impact of technological change on Wind Mobile's business: For the same reason as the one indicated in the preceding paragraph, the Tribunal questions whether communications related to this subject matter constitute legal advice meeting the *Gallo* prerequisites in the first place. Absent evidence by GTH that each withheld communication falling within this category involves a legal advice, GTH's claim for common interest privilege on this category is dismissed. The relevant documents must be produced forthwith. 5.9 Communications discussing negotiations of roaming and tower/site sharing agreements: The Tribunal need not decide on this category given that Canada does not object to the extent that these communications constitute legal advice, are privileged further to the Tribunal's determination regarding in-house counsel and that the applicable laws recognize common interest privilege in respect of such communications. 5.10 Communications discussing the move of GTH's [redacted] place of operations from Cairo to Amsterdam: In light of the arguments advanced by Canada in paragraph 32, and the lack of meaningful detail in [redacted], the Tribunal does not find sufficient evidence of a commonality of interest between GTH and VimpelCom to warrant an exception to the disclosure rule in compliance with PO 3. GTH's claim for common interest privilege on this category is dismissed. The relevant documents must be produced forthwith. 5.11 Communications discussing AAL's liquidity rights and the exit notice under the Amended and Restated Shareholder Agreement:

	The Tribunal need not decide on this category given that Canada does not object to the extent that these communications constitute legal advice, are privileged further to the Tribunal's determination regarding in-house counsel and that the applicable laws recognize common interest privilege in respect of such communications. 5.12 Communications discussing VimpelCom's decision to impair the value of its Canadian assets, and/or the decision to reduce or cease funding of Wind Mobile: The Tribunal questions whether communications related to this subject matter constitute legal advice meeting the *Gallo* prerequisites in the first place. Absent evidence by GTH that each withheld communication falling within this category involves a legal advice, GTH's claim for common interest privilege on this category is dismissed.

II. Limited Waiver Of Privilege	The Tribunal stated the following on page 22 of PO5: It is open to the Parties to provide evidence that privilege has not been waived in total or in part by such disclosure of information [to third parties] under the relevant applicable law in the case of each disputed communication. Such evidence can only be contemplated in relation to the rules of privilege in Canada, the United States, England and Wales, the Netherlands, and New Zealand, as the Tribunal has already determined that privilege rules in Egypt do not allow in-house counsel to claim privilege, let alone to claim entitlement thereto following disclosure to third persons.
Summary of Claimant's Position	1. As noted above,[63] in light of the Tribunal's decision in PO5, GTH is not seeking to assert limited waiver of privilege with respect to communications where advice is only being solicited from or rendered by Dutch lawyers. Thus, GTH below provides evidence that English, Canadian, U.S. and New Zealand law all recognize limited waiver of privilege, such that GTH is entitled to rely upon it in the circumstances where it is claimed. For the avoidance of doubt, should the Tribunal decide that common interest privilege does not apply to the communications involving the different entities in the VimpelCom/GTH/Wind Mobile group, GTH avers that any privileged communications shared amongst those entities were also shared, confidentially, on the basis of a limited waiver, in accordance with the principles set out below. 2. GTH noted in its letter dated 12 November 2018 that limited waiver is a concept recognized by Canadian law.[64] The concept similarly exists under English law. In *Berezovsky v Hine & others*, the English Court of Appeal summarized the position as follows:

63 *See* footnote 1 above.

64 GTH's Letter to the Tribunal, 12 November 2018, ¶¶ 35-41. *See* **Exhibit C-406**, *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, 2005 CarswellOnt 3934, ¶ 57 ("*In my view, there is no necessity, in order to achieve the societal objective of fair financial statements certified as fair by fully informed auditors, that the waiver go beyond the auditors. By definition, the waiver enables the auditors to comply with the full scope of their audit standards. To hold that the waiver is broader than that, is to sanction a more than 'minimal impairment' of this privilege which is fundamentally important to our justice system. In my view, the jurisprudence prevents finding that the Legal Opinions, once given to the auditors in that capacity for their purposes, were thereby made available to be handed over to the Commission for its purposes. That the statute compelling production to the auditors was not directly invoked seems to me to be irrelevant: it was there in the background. Even if the statute did not exist, the fundamental importance of solicitor-client privilege would dictate the narrow waiver rather than the broad.*"). *See also* **Exhibit C-442**, *Penner v P Quintaine & Son Ltd*, 2008 MBQB 216, ¶ 3 ("*The Court of Appeal has held that the disclosure made by Quintaine is the subject of a limited waiver of litigation privilege. Limited waiver has been given a firm foundation by the Supreme Court of Canada. Sopinka, Lederman and Bryant, in The Law of Evidence in Canada, 2nd ed. (Toronto: Butterworths, 1999), state: §14.30 The Supreme Court signalled the next stage of this evolution by introducing the concept of 'partial privilege', which permits the court, on balancing the respective interests, to*

	28. Fourthly, '[i]t does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see British Coal Corporation v Dennis Rye (No 2) [1988] 1 WLR 113 and Bourns Inc v Raychem Corporation [1999] 3 All ER 154' – per Lord Millett giving the judgment of the Privy Council in B v Auckland District Law Society [2003] UKPC 38, [2003] 2 AC 736, para 68. **As Lord Millett went on to say, it 'must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause the privilege to be lost'.** 29. Fifthly, where privilege is waived, the question whether the waiver was limited, and, if so, the parameters of the limitation, must be determined by reference to all the circumstances of the alleged waiver, and, in particular, what was expressly or impliedly communicated between the person sending, and the person receiving, the documents in question, and what they must or ought reasonably have understood – cf. per Hoffmann LJ in Brown v Guardian Royal Exchange plc [1994] 2 Lloyd's Rep 325, 328, as discussed by Aikens J in Winterthur Swiss Insurance Company v AG (Manchester) Ltd (in liquidation) [2006] EWHC 839 Comm, para 74.[65] 3. The Privy Council case cited in the above extract (*B v Auckland District Law Society*[66]) is, in fact, a New Zealand case of the highest appellate court confirming the existence of limited waiver of privilege in that jurisdiction: The Society's argument, put colloquially, is that privilege entitles one to refuse to let the cat out of the bag; once it is out of the bag, however, privilege cannot help to put it back. Their Lordships observe that this arises from the nature of privilege; it has nothing to do

accord a privilege to specific communications or documents, but to allow limited disclosure of others, all taking place within the same relationship."); **Exhibit C-436**, *M. (A.) v Ryan*, [1997] 1 S.C.R. 157, ¶ 18 ("*A third preliminary issue concerns the distinction between absolute or blanket privilege, on the one hand, and partial privilege on the other. While the traditional common law categories conceived privilege as an absolute, all-or-nothing proposition, more recent jurisprudence recognizes the appropriateness in many situations of partial privilege. The degree of protection conferred by the privilege may be absolute or partial, depending on what is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation. Partial privilege may signify that only some of the documents in a given class must be produced. Documents should be considered individually or by sub-groups on a 'case-by-case' basis.*")

65 **Exhibit C-444**, *Berezovsky v Hine & others* [2011] EWCA Civ 1089, ¶¶ 28-29 (emphases added).

66 **Exhibit C-439**, *B v Auckland District Law Society* [2003] UKPC 38.

	with waiver. **It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only**: see British Coal Corp v Dennis Rye Ltd (No 2) [1988] 3 All ER 816, [1988] 1 WLR 1113 and Bourns Inc v Raychem Corp [1999] 3 All ER 154. The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.[67] 4. In *C-C Bottlers Ltd v Lion Nathan Ltd*,[68] the High Court of Auckland had to consider whether privilege had been waived in a document prepared by a party's solicitors that was subsequently sent to the party's financial advisers. The court held that the disclosure to the financial advisers was a limited waiver applying to the financial advisers but did not constitute a waiver of the privilege generally, and in particular was not a waiver as against the other parties in that case. In coming to this view, Henry J relied on the following passage from an earlier judgment that he had given in another case (which concerned whether privilege had been waived in documents which a party had disclosed to its insurance broker): The privilege claimed here is from disclosure to the defendant and the question of a claim of privilege as against [the insurance broker] is not presently in issue. In my judgment the fact of disclosure of a document when confined to a particular non-party does not necessarily constitute a waiver of privilege available to a party seeking production. In principle, it seems to me that disclosure, for example by a plaintiff to an associate or confidant unconnected with the proceeding of written legal advice on a claim against a

67 **Exhibit C-439**, *B v Auckland District Law Society* [2003] UKPC 38, ¶¶ 68-69.

68 **Exhibit C-434**, *C-C Bottlers Ltd v Lion Nathan Ltd* [1993] 2 NZLR 445 (HC).

	defendant, in ordinary circumstances would not and should not constitute a waiver as against the defendant . . . .[69] 5. The rule is similar under U.S. law. It is not a waiver of privilege to disclose a document or information to non-attorneys whose expertise is relevant to the provision of legal advice. In the seminal case upholding the application of privilege to information disclosed to accountants, the Second Circuit explained[70]: Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. By the same token, if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought fall within the privilege; there can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer's physical presence while the client dictates a statement to the lawyer's secretary or in interviewed by a clerk not yet admitted to practice. 6. It is widely accepted that *Kovel* is the leading case in the United States concerning waiver of privilege with respect to third-party advisers.[71]

[69] **Exhibit C-434**, *C-C Bottlers Ltd v Lion Nathan Ltd* [1993] 2 NZLR 445 (HC), p. 448, *citing* **Exhibit C-433**, *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* [1990] 2 NZLR 381 (HC), p. 6.

[70] **Exhibit C-432**, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

[71] *See, e.g.*, **Exhibit C-447**, *United States v. Adams*, 2018 WL 5311410, *1¬–2 (D. Minn. Oct. 27, 2018) (applying Kovel doctrine to uphold attorney-client privilege of communications between client and accountants); **Exhibit C-446**, *Chartwell Therapeautics Licensing LLC v. Citron Pharma LLC*, 2018 WL 3442542, at *1–3 (E.D.N.Y. July 17, 2018) (same).

	7. Similarly, public relations firms have been found to be so intertwined with a company's operations that communications shared with the public relations firm are akin to communications with the client. When these communications occur "*for the purpose of obtaining legal advice*" they are protected by attorney-client privilege.[72] 8. As is clear from the foregoing, limited waiver of privilege (or the application of privilege beyond a client's lawyers) is a well-established concept in all four of the jurisdictions in question, aimed at preventing unjust discovery of documents that would otherwise be protected by the law of privilege. The key inquiry is whether the document has been disclosed to a third party for a limited purpose related to the need for the party to receive that legal advice.[73] GTH submits that, as regards the documents in question, any waiver of privilege was for a limited purpose. In light of PO5 and the parties' submissions reflected therein, it now appears that the advisers to whom the question of limited waiver of privilege might apply are limited to UBS, Earnscliffe, and PwC. These are each addressed in turn below: 8.1. <u>UBS:</u> GTH has explained the limited waiver with respect to UBS.[74] Although GTH has already disclosed many documents that include UBS, there are a limited number of communications that have been withheld for privilege because they involve disclosure of confidential legal advice (almost exclusively from outside counsel) for a particular purpose. Even where including UBS in the communications did not facilitate the provision of legal advice, any waiver of privilege is limited and does not constitute a waiver of privilege with respect to other third parties, in particular Canada. This is because the legal advice being given was relevant to the advisory role being provided by UBS and, accordingly, it was important for it to be shared with UBS. Sharing privileged communications for such a limited purpose does not cause privilege to be waived generally. 8.2. <u>Earnscliffe:</u> With respect to Earnscliffe's work, GTH maintains that these communications were subject to solicitor-client privilege because Earnscliffe were a public relations firm being instructed and working directly with counsel. Certain communications with Earnscliffe would also be subject to litigation privilege (a doctrine

[72] **Exhibit C-438**, *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

[73] **Exhibit C-432**, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) ("*if the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client* ***reasonably related to that purpose*** *ought to fall within the privilege . . . . What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.*") (emphases added); **Exhibit C-444**, *Berezovsky v Hine & others* [2011] EWCA Civ 1089, ¶¶ 28-29 ("*it does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only*") (citation and quotations omitted); **Exhibit C-439**, *B v Auckland District Law Society* [2003] UKPC 38, ¶¶ 68-69 ("*It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only.*").

[74] GTH's Letter to the Tribunal, 12 November 2018, ¶¶ 39-40.

	indisputably recognized by all of Canadian, U.S., English and New Zealand law),[75] insofar as the communications came into existence in contemplation of litigation. Should the Tribunal disagree with these submissions, however, GTH maintains that any privileged communications disclosed to Earnscliffe amounted to a limited waiver: it was certainly never the expectation of any of the parties involved that disclosure to Earnscliffe in this manner would amount to a waiver of privilege.[76] GTH repeats: the vast majority of the communications including Earnscliffe that have been withheld are communications including outside counsel (with the remaining communications being peripheral to the same discussions including outside counsel), on subjects such as "*Letter to Government*", "*Court cases*", "*Draft submissions to government*", "*Letter from IRD and preparing for meeting - PRIVILEGED AND CONFIDENTIAL*". These communications are obviously privileged and Canada's continuance to push this issue constitutes an inappropriate request to order GTH to disclose privileged and confidential materials. 8.3. PwC: Similar to the above regarding Earnscliffe, GTH has confirmed that the communications with PwC that are included in the Amended Privilege Log[77] either include lawyers from Bennett Jones, or are email chains forwarding discussions including lawyers from Bennett Jones, pertaining to the tax structuring of the potential sale of Wind Mobile. GTH maintains that privilege is properly claimed over these communications. To the extent there has been a waiver of privilege it was only for the limited purpose of allowing PwC to assist with the tax structuring of the proposed transaction. The communications remain strictly confidential.

[75] See, e.g., **Exhibit C-441**, *Blank v Canada* (*Department of Justice),* 2006 SCC 39, ¶ 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.*"); **Exhibit C-438**, *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 221 (S.D.N.Y. 2001) ("*It is firmly established, however, that a document that assists in a business decision is protected by work-product immunity if the document was created because of the prospect of litigation.*"); **Exhibit C-440**, *The TAG Group Litigation Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) and others* [2006] EWHC 839 (Comm), ¶ 67-68 ("*The cases have developed a distinction between two sub-types, or 'sub-heads'…of 'legal professional privilege'. In the earliest cases the privilege from compulsory production was confined to information (principally documentary) that was created where legal proceedings were in contemplation. That type of legal professional privilege has become known today as 'litigation privilege'…*"); **Exhibit C-433**, *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* [1990] 2 NZLR 381 (HC), p. 2 ("*The Plaintiff claimed privilege in respect of those documents on the ground that they came into existence after the proceeding was contemplated and were compiled for the purposes of the litigation. The legitimacy of that claim of privilege is not in question.*")

[76] *See* IBA Rules, Article 9(3)(c).

[77] With the exception of one document which, in light of PO5, GTH will produce to Canada.

	In addition to GTH's prior submissions, Procedural Order No. 5 and the IBA Rules, the Tribunal may refer to the following authorities: **Exhibit C-406**, *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, 2005 CarswellOnt 3934, ¶ 57. **Exhibit C-440**, *The TAG Group Litigation Winterthur Swiss Insurance Company and another v AG (Manchester) Ltd (in liquidation) and others* [2006] EWHC 839 (Comm), ¶ 67-68. **Exhibit C-442**, *Penner v P Quintaine & Son Ltd*, 2008 MBQB 216, ¶ 3. **Exhibit C-436**, *M. (A.) v Ryan*, [1997] 1 S.C.R. 157, ¶ 18 **Exhibit C-444**, *Berezovsky v Hine & others* [2011] EWCA Civ 1089, ¶¶ 28-29. **Exhibit C-439**, *B v Auckland District Law Society* [2003] UKPC 38, ¶¶ 68-69. **Exhibit C-434**, *C-C Bottlers Ltd v Lion Nathan Ltd* [1993] 2 NZLR 445 (HC), p. 448. **Exhibit C-433**, *Harbour Inn Seafoods Ltd v Switzerland General Insurance Co Ltd* [1990] 2 NZLR 381 (HC), pp. 2, 6. **Exhibit C-432**, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). **Exhibit C-447**, *United States v. Adams*, 2018 WL 5311410, *1¬–2 (D. Minn. Oct. 27, 2018). **Exhibit C-446**, *Chartwell Therapeautics Licensing LLC v. Citron Pharma LLC*, 2018 WL 3442542, at *1–3 (E.D.N.Y. July 17, 2018). **Exhibit C-438**, *In re Copper Mkt. Antitrust Litig*., 200 F.R.D. 213, 219-221 (S.D.N.Y. 2001). **Exhibit C-441**, *Blank v Canada (Department of Justice)*, 2006 SCC 39, ¶ 27.
Summary of Canada's Position	1. The Claimant bears the burden of demonstrating the existence of specific "exceptions," in each of the jurisdictions, which would allow for it to continue invoking privilege over documents disclosed to third parties and communications with non-legal advisors, in this case UBS, Earnscliffe and PWC. It has failed to do so. 2. As a preliminary matter, there is no support for the Claimant's assertions in paragraph 8 that limited waiver is "aimed at preventing unjust discovery of documents that would otherwise be protected by the law of privilege" or that the "key inquiry is whether the document has been disclosed to a third party for a limited purpose related to the need for the third party to receive that legal advice."[78] Limited waiver is not rooted vague notions of a third party's "needs" based on some undefined "limited purpose". Rather, the authorities make clear that limited waiver is only warranted if a communication to a third party is necessary for the purpose of *obtaining* legal advice. In other words, it applies where a counsel from whom the legal advice is being sought communicates

[78] Claimant's Summary of Position on Limited Waiver, ¶ 8.

	with a third party and the communication is necessary for the provision of the legal advice. The Claimant's submissions acknowledge that this is the applicable test under US law.[79] 3. Similarly, for the reasons set out below limited waiver does not apply to the sharing of information between entities belonging to a corporate family.[80] Limited waiver applies under extremely narrow circumstances, such as disclosure of a privileged communication for a narrow purpose pursuant to a statutory compulsion or where the disclosure is necessary to facilitate the provision of legal advice. The Claimant has not claimed any statutory compulsion related to the disclosure of information or claimed that the communications with related corporate entities were necessary to the provision of legal advice. 4. Canada does not agree with the Claimant's presentation of the applicable law of each of the jurisdictions with respect to limitations for waiver of privilege further to disclosure to third parties. 5. With respect to the law applicable in Canada, the Claimant fails to cite any further authorities demonstrating that the concept of limited waiver should apply beyond the limited scenarios contemplated by the *Philip Services*[81]and *Interprovincial Pipe Line Inc.* cases, [82] which related to disclosures to auditors as a result of statutory requirements. While the Supreme Court of Canada's *Ryan* decision, cited by the Claimant, discusses the limits of privilege attaching to a patient's medical records in general, it does not deal with an invocation of limited waiver and says nothing about the parameters of the principle of limited waiver, and is accordingly of no use to the Tribunal here. Generally, in Canada solicitor-client privilege can extend to communications between

[79] This test is also reflected in Gibson Dunn's own commentary on privilege on their web site: To what extent must the communication be confidential? Who can be privy to the communication without breaking privilege? To be considered attorney–client privileged, the communication must be confidential when made and the client must intend that the communication remain confidential. […] Such communications can be made or shared with third parties reasonably **necessary to the lawyer's services**. Clients must be careful not to include non-essential third parties because sharing such communications with those parties may jeopardise the privilege. **R-328**, F Joseph Warin, Daniel P Chung and Audi Syarief, Gibson, Dunn & Crutcher, *Privilege, United States* (Nov. 2016), p. 2, available at: https://www.gibsondunn.com/wp-content/uploads/documents/publications/Warin-Chung-Know-how-US-Privilege-GIR-November-2016.pdfhttps://www.gibsondunn.com/wp-content/uploads/documents/publications/Warin-Chung-Know-how-US-Privilege-GIR-November-2016.pdf.

[80] Canada notes the Claimant's assertion, made for the first time in these proceedings, that if the Tribunal decides "that common interest privilege does not apply to the communications involving the different entities in the VimpelCom/GTH/Wind Mobile group … [then] any privileged communications shared amongst those entities were also shared on the basis of a limited waiver." Claimant's Summary of Position on Limited Waiver, ¶ 7.

[81] **C-406**, *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, 2005 CarswellOnt 3934.

[82] In *Interprovincial Pipe Line Inc.*, the court relied on the existence of a legislative requirement to disclose documents to the auditor to conclude to the existence of a limited waiver. (**R-329**, *Interprovincial Pipe Line Inc. v. M.N.R.*, [1996] 1 FC 367 (TD), p. 12).

	lawyers and third parties in circumstances where the third party's expertise is essential to the provision of the legal advice.[83] 6. Regarding the law of England and Wales, the Claimant cites to the *Berezovsky* decision of the English Court of Appeal. However, this case does nothing more than acknowledge the existence of a limited waiver in England and Wales (which Canada does not challenge). The case however makes clear that "the parameters of the limitation must be determined by reference to all the circumstances of the alleged waiver." This statement falls far short of the types of "specific" exceptions cited by the Tribunal in *Procedural Order No. 5* that might warrant a claim of limited waiver, and does nothing to support a claim that English law extends limited waiver to the kinds of disclosures that are at issue in this arbitration. In particular, the Claimant has provided no evidence of precautions that were taken to maintain the confidentiality of the legal advice or that it was accompanied by an express indication that the legal advice was shared for a limited purpose. 7. New Zealand: While Canada does not contest that limited waiver is recognized in New Zealand, it does not have the broad scope that the Claimant describes in selected extracts from the 2003 *Auckland District Law Society* and 1993 *C-C Bottlers* decisions of the New Zealand courts. In particular, the Claimant has provided no evidence of precautions that were taken to maintain the confidentiality of the legal advice or that it was accompanied by an express indication that the legal advice was shared for a limited purpose. 8. Finally, with respect to the law of the United States, while the Claimant cites to a 2nd Circuit decision from 1961, the U.S. courts have, over the course of the past 58 years, progressively rejected the concept of a limited waiver. For example, in *Fisher*, the Supreme Court of the United States found that attorney-client privilege protects "only those disclosures - necessary to obtain informed legal advice - which might not have been made absent the privilege."[84] This rule was later reflected in the "Permian Rule" that flatly rejects the concept of limited waiver in US law. The finding in this case held, "the attorney-client privilege should be available only at the traditional

[83] *See* **R-330**, *Taylor v. Cooper*, 2013 BCSC 2073; **R-331**, *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2006 BCSC 1180; **R-332**, *Solosky v. Canada*, [1980] 1 S.C.R. 821; **R-333**, *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893; **R-334**, *Susan Hosiery Ltd. v. M.N.R.*, [1969] D.T.C. 5278 (Ex. Ct.); **R-335**, *Pearson v. Inco Ltd.*, [2008] O.J. No. 3589 (S.C.J.); and **R-336**, *Seller v. Grizzle* (1994) 95 B.C.L.R. (2d) 297. This determination will be made on a case by case basis. Counsel must have retained the expert, such as an accountant, engineer, or doctor, to interpret their client's information. See **R-305**, *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. 3d 321 (Can. Ont. C.A.). *See also* **R-337**, *Long Tractor Inc. v. Canada (Deputy Attorney General)* (1998), 155 D.L.R. (4th) 747.

[84] **R-338**, *Fisher v. United States*, 425 U.S. 391, 403 (1976), at p. 9.

	price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality."[85] The body of case law in this respect has led commentators to argue that, "[t]he limited waiver rule has been largely rejected in the United States."[86] Outside of the context in which a disclosure is necessary to obtain informed legal advice, limited waiver is not available under U.S. law. 9. Given the Tribunal's finding that the applicable law with respect to privilege is the law of counsel's call to the bar, this law should also guide the determination as to whether a limited waiver exception can be invoked. However, once privilege is lost in one jurisdiction, because the limited waiver exception does not apply, privilege cannot continue to be invoked over the communication. 10. Finally with respect to whether the limited waiver of privilege exception might apply to withheld communications with UBS, Earnscliffe, and PwC, Canada makes the following additional comments: a) UBS: the Claimant has not asserted that the communications with UBS over which privilege is being claimed were necessary to the provision of legal advice. Instead it claims that GTH has shared legal advice with UBS because it was relevant to UBS' advisory role. As explained above the law in Canada and the US does not allow solicitor client privilege to be maintained if it is shared with a third party for the purpose of obtaining business advice. Nor would it extend to business discussions related to the shared legal advice. In any event, the Claimant has not even provided evidence regarding what was shared, whether it was through legal counsel, and under what terms. b) Earnscliffe: the Claimant has not asserted that the communications with Earnscliffe over which privilege is being claimed were necessary to the provision of legal advice. Instead it claims that the communications are privileged because the PR firm was instructed by (presumably Canadian or US) counsel. Whether disclosure to a third party waives privilege is not determined by whether the third party is working with counsel. While factual information about the regulatory process may have been shared with the public relations firm for the purpose of lobbying the government, it is unlikely that legal advice was shared, and if it was, privilege was lost.

[85] **R-339**, *Permian Corp. v. United States*, 665 F2d 1214, 1221 (D.C. Cir. 1981) at 1222. *See also*, **R-340**, *Maryville Academy v. Loeb Rhoades & Co., Inc.*, 559 F.Supp. 7, 9 (N.D. Ill. 1982), at p. 3. Circuit court decisions that reject the notion of "selective waiver" include **R-341**, *re Pacific Pictures*, 679 F.3d 1121 (9th Cir. 2012), at p. 9; and **R-311**, *Westinghouse Electric Corp. v Republic of the Philippine*s, 951 F.2d 1414, at p. 12.

[86] **R-342**, Jonathan Auburn, *Legal Professional Privilege: Law and Theory* (Oxford: Portland Oregon, 2000), p. 205. For a further discussion on a rejection of the concept of "limited waiver" in US courts see **R-343**, Jill A. Hornstein, *Paying the "Traditional Price" of Disclosure: The Third Circuit Rejects Limited Waiver of the Attorney-Client Privilege: Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991)*, 71 Wash. U. L. Q. 467 (1993), available at: http://openscholarship.wustl.edu/law_lawreview/vol71/iss2/11.

	The Claimant has provided no explanation or support for its assertion that Earnscliffe was retained in contemplation of litigation or that communication with Earnscliffe was in contemplation of litigation. Nor has it provided any details regarding the timing of such communications and the litigation that was being contemplated. The fact that outside counsel was involved in the communications does not change anything. It only serves to highlight the point that Canada made previously regarding outside counsel's role in the *Investment Canada Act* application process which was not limited to the provision of legal advice. The examples of communications *Letter to Government*", "*Draft submissions to government*", "*Letter from IRD and preparing for meeting"* confirm that the communications relate not to legal advice but to discussions and representations to the government in the context of the regulatory process. Further, the Claimant's argument that the parties did not expect that communications with a public relations firm would be disclosed should be rejected: the parties' expectations should have been informed by Canadian law which does not recognize a limited waiver exception for communications with a public relations firm. c) PwC: the Claimant has not asserted that the communications with PWC over which privilege is being claimed were necessary to the provision of legal advice. Instead it claims that communications included outside legal counsel and related to the tax structuring of the potential sale of Wind Mobile. As explained above not every communication that includes outside counsel becomes privileged and the fact that outside counsel is copied does not suffice for the communication to qualify under the limited waiver exception.
Guidance or Order from the Tribunal	1. GTH avers its case for partial privilege, or limited waiver of privilege, in the event the Tribunal decides that common interest privilege, argued in (I) above, does not apply to the communications involving the different entities in the VimpelCom/GTH/Wind Mobile group.[87] To that end, GTH adduces authorities evidencing that limited privilege is recognized in the laws of Canada, England and Wales, and the United States.[88] Moreover, the Parties agree that the advisers to whom the question of limited waiver of privilege might apply are UBS, Earnscliffe, and PwC. 2. First in relation to UBS, GTH is not as conclusive in its submissions as would have been expected in view of its successive purported reviews of the privilege log. References to "***almost exclusively*** *from outside counsel*"[89] cannot be accepted as they would lead to arbitrary decisions on evidence that may be relevant for Canada's case. Absent

[87] GTH's submission at § 1 in Part II of this Schedule.

[88] *Idem* at §§ 2-5.

[89] *Idem* at § 8.1.

	evidence that limited waiver attaches under the relevant law to the sharing of each privileged communication with UBS, GTH is required to comply with the production order in PO 3. 3. Canada disputes that *Kovel*[90] sets the standard for the applicable test, at least in the United States. Setting aside for a moment whether *Permian*[91] superseded *Kovel* as Canada submits, Canada seems to be reading *Kovel* unduly restrictively by limiting its application to cases where counsel originates the communication to the third party, whereas Justice Friendly in his opinion accepted that the principle could apply in cases where the client speaks with the accountant without the lawyer sitting in.[92] That said, the Tribunal notes that *Kovel* does require that the accountant be engaged by the lawyer, that the lawyer has directed the client to tell his story in the first instance to the accountant, and that the purpose of that telling is for the accountant to interpret that story so that the lawyer may better give legal advice. Outside that purpose, which must be the leading thread throughout the sharing of communications with third parties, privilege is bound to be defeated. GTH has not evidenced that each privileged document communicated to UBS respects the strict criteria identified in *Kovel.* Accordingly, GTH's claim for a limited waiver in relation to UBS is dismissed. The Tribunal adds that the fate of GTH's claim thus decided was in any event inescapable in view of the fact that the sharing of the privileged advice was meant, not to allow the provision of legal advice, but to permit the provision of UBS's business advice. The Tribunal accordingly need not proceed to decide whether *Kovel* or *Permian* (which is obviously even stricter that *Kovel*) sets the relevant law. 4. The Tribunal notes that Canada does not agree with GTH's presentation of the law applicable in each of the jurisdictions with respect to limitations of waiver of privilege further to disclosure to third parties.[93] Without limiting its decision in PO 5 on the law applicable to legal privilege, as reiterated in this Order, and while expecting that the guidance given in this Order will meet the intended purpose of permitting a voluntary disclosure without the need to have specific decisions rendered by the Tribunal in relation to each of the relevant jurisdictions, the Tribunal underscores that an application from either Party asking for a ruling on legal privilege and its extension through common interest sharing in relation to specific jurisdictions will require better particularized submissions and

[90] C-432, *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

[91] R-339, *Permian Corp. v. United States*, 665 F2d 1214, 1221 (D.C. Cir. 1981).

[92] *Idem* at 3.

[93] Canada's submission at § 4 above in this Schedule.

	evidence of the applicable law, including legal expert reports, in addition to a likely hearing, to enable it to issue such a ruling. Any application to that end is expected to be made without delay to avoid impacting the upcoming procedural stages. 5. The Tribunal's view expressed in paragraph 3 above applies *mutatis mutandis* to privileged communications shared with Earnscliffe, a public relations firm, and PWC, acting as a tax councilor. In both cases, GTH argues that the participation of counsel in the exchange with Earnscliffe and with PWC leads to the assertion of privilege. As Canada correctly points out, GTH has not asserted that the sharing of the legal advice with those third parties was necessary for the provision of legal advice. Lobbying the government and offering tax advice does not amount to legal advice. Absent GTH evidencing that the purpose of the sharing of information with Earnscliffe and with PWC was to permit the provision of legal advice (or advice in contemplation of litigation), the claimed privilege is defeated. GTH is accordingly ordered to disclose the relevant documents shared with Earnscliffe and with PWC.

III. Subject Matter Waiver	Canada has alleged: "[t]he Claimant has alleged that it relied on the advice of [redacted] as part of its due diligence efforts that informed its expectations prior to investing in Wind Mobile. It implies that the content of the advice supports its allegations. By disclosing the subject matter of legal advice, the Claimant has waived any attorney-client privilege that may have applied to the documents relating to this issue."
Summary of Claimant's Position	1. Canada had not originally included subject-matter waiver as an issue for determination when it provided GTH with the list of issues for determination in the Stern Schedule of Disputed Issues Regarding the Claimant's Assertions of Legal Privilege. Only once GTH had completed its submissions (based on the list of issues provided by Canada) did Canada add its submissions on subject matter waiver. GTH has thus not yet had an opportunity to respond to this issue, and the Tribunal did not decide the matter in its Procedural Order No. 5. Canada has now indicated that it wishes to maintain this objection and that it intends to request the Tribunal to decide the matter. In this context, GTH provides its submissions on Canada's subject-matter waiver objection below. 2. GTH has not waived privilege in the course of these proceedings. Rather, GTH has been careful to maintain privilege to avoid exactly the type of allegation now being advanced by Canada. Based on its limited submissions to date, it is not even clear from Canada's submission where GTH has waived privilege with respect to particular issues.[94] 3. GTH presumes that Canada's vague reference to the advice of [redacted] (a Canadian law firm) is to paragraph 82 of Claimant's Memorial on the Merits and Damages, which reads: "*On 3 March 2008, the Investment Committee convened to discuss the opportunity in Canada and whether GTH should provide the LOC required by Globalive to participate in the Auction. In advance of the call, members of the Investment Committee received materials describing Globalive's background and experience, key elements of the Canadian legal and regulatory framework including specific conditions relevant to the 2008 AWS Auction, and Globalive's proposed vehicle structure to pursue the investment. The Investment Committee also received market materials describing the regulatory framework and important terms of the 2008 AWS Auction. By this point, Globalive had agreed to allow GTH to withdraw the LOC and exit from the Auction if a joint venture could not be established, and Industry Canada had confirmed that GTH would be permitted to withdraw under these*

[94] To the extent not addressed below, GTH reserves the right to respond to Canada's allegation of subject matter waiver upon better particularisation of the issue by Canada.

	circumstances. ***GTH had also received advice from the Canadian law firm, [redacted], regarding the structural requirements to comply with the O&C Rules. On the basis of this information, the Investment Committee decided that GTH should continue its negotiations with Globalive and enter into an agreement to provide the LOC necessary to participate in the Auction.***"[95] 4. The two emphasized sentences in the above extract include footnotes (187 and 188) citing to paragraphs 11 and 13 of Mr. Dobbie's witness statement. Footnote 187 also clearly states: "*For the avoidance of doubt, no privilege is waived with respect of the legal advice obtained from* [redacted]." 5. Paragraph 11 of Mr. Dobbie's witness statement read as follows: "***During February 2008, I liaised with Globalive and*** [redacted] ***in relation to the regulatory and legal conditions surrounding the potential investment and how a potential investment could be structured in order to comply with the O&C Rules.*** *In the course of those discussions, I became aware that there was a policy movement in Canada towards a relaxation of the O&C Rules which would allow a foreign company like GTH to take control of its investment in Wind Mobile, and Globalive ultimately agreed to structure the investment in a way that would give GTH the right to take control if the O&C Rules changed.*" 6. Again, the emphasized sentence above is followed by a footnote (8) that states: "*For the avoidance of doubt, privilege is not waived with respect to this legal advice.*" 7. Paragraph 13 of Mr. Dobbie's witness statement reads as follows: "*On 3 March 2008, GTH's Investment Committee convened a call to discuss whether GTH should provide the required LOC.* ***In advance of that call, Mr. O'Connor and others circulated background materials including market commentary, the materials received from Globalive, and legal advice regarding the legal and regulatory requirements applicable to the proposed investment opportunity.*** *Mr. O'Connor informed me after the call that the Investment Committee had agreed to provide the LOC to participate in the AWS Auction and that we should proceed with finalizing an agreement on this point with Globalive.* 8. Once again, the emphasized sentence above is followed by a footnote (14) that states: "*For the avoidance of doubt, privilege is not waived with respect to this legal advice.*"

[95] Memorial on the Merits and Damages, ¶ 82 (emphasis added, cites omitted).

	9. With the above as background, Canada's submission that there has been any subject matter waiver is wrong and inappropriate: 9.1. Canada has cited no authoritative support for its submission, despite now having pleaded the issue twice: first in its letter dated 2 November 2018 and secondly in the Parties' Stern Schedule of Disputed Issues Regarding the Claimant's Assertions of Legal Privilege, dated 29 November 2018. This is because there is none. 9.2. GTH respectfully submits that questions of subject matter waiver raised by Canada are ones of international law, as Canada's assertion is that privilege has been waived in GTH's pleadings in this Arbitration (*i.e.*, when the Parties expectations as to the applicable law was and is, without question, the law of the Arbitration). GTH directs the Tribunal to IBA Rule 9.3(d), which provides the Arbitral Tribunal may take into account "*any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise.*"[96] 9.3. In this instance, GTH has clearly *not consented* to waive privilege. Rather GTH explicitly and repeatedly maintained privilege over the content of [redacted] legal advice. 9.4. GTH also did not disclose the content of [redacted] advice or put the content of the advice affirmatively at issue. GTH simply referenced the *non-privileged fact* that a privileged communication with counsel occurred. Accordingly, under a straightforward application of the IBA Rules, GTH has not waived privilege here. Any suggestion by Canada to the contrary is an incorrect reading of GTH's submissions. 9.5. Should the Tribunal choose to apply Canadian law, it would reach the same result and reject Canada's nonsensical assertion of waiver. Under Canadian law, subject matter waiver is narrowly applied in circumstances in which a party unfairly and misleadingly discloses a portion of a privileged communication but withholds the rest of it.[97] Again, in this instance, GTH has not disclosed *any* portion of a privileged communication, but has simply referenced the *fact* that a communication with counsel occurred. All that GTH has disclosed is that, as one part of its due diligence, it communicated with counsel about the Canadian ownership and control rules, and then formed certain expectations about the legal framework. Disclosing the fact of the communication without disclosing anything about its contents is neither misleading nor unfair. Indeed it is particularly difficult to understand how it could be unfair in these circumstances, when Canada has

[96] IBA Rules, Article 9.3(d).

[97] **Exhibit C-437**, *Bone v. Person*, 2000 CarswellMan 109 (C.A.), ¶ 10 (noting subject matter waiver applies if "*there is an indication that a party is attempting to take unfair advantage of present a misleading picture by selective disclosure.*") (citations and quotations omitted).

	not seriously contested that it created the general expectation in the industry that the ownership and control rules would be relaxed in the future.[98] 9.6. Finally, Canada's attempt to pierce GTH's privilege in this regard is telling of its overall approach to disclosure in this Arbitration and underscores why GTH has been right to closely guard its privilege.
Summary of Canada's Position	1. In Canada's letter to the Tribunal dated November 2, 2018, at Section II.B.2(b), Canada explained that the Claimant had waived privilege in the course of this arbitration over certain legal advice provided to the Claimant which it has referred to and put at issue in the context of this arbitration. This includes in particular the legal advice provided by the law firm [redacted] In the Stern Schedule of Disputed Issues Regarding the Claimant's Assertions of Legal Privilege dated November 29, 2018, at Outstanding Issue 4, section (vi), Canada maintained its position on this issue. Below, Canada outlines: (i) the law on subject-matter waiver in Canada (where counsel for [redacted] was most likely admitted); and (ii) how the law applies to the Claimant. 2. Canada respectfully requests the Tribunal to determine that the Claimant waived attorney-client privilege, and must produce without redactions all documents containing and discussing advice provided to the Claimant in relation to whether the Claimant: (a) would be permitted to transfer Wind Mobile's spectrum licences to an Incumbent after the five-year rollout period; and (b) would be able to obtain full voting control over Wind Mobile following an anticipated relaxation in the ownership and control rules. **A. LAW ON SUBJECT-MATTER WAIVER** 3. Subject-matter waiver, also known as deemed waiver, occurs when a party puts its knowledge of the law or the legal advice that it received into issue and attempts to rely on privileged communications in support of its case.[99] As the Court in *Canadian Appliance Source* explained, "a party will be deemed to have waived privilege if the party places its state of mind in issue with respect to its defence and has received legal advice to help form the state of mind."[100] In such circumstances, waiver is implied because it is unfair to permit a party to premise a

[98] Claimant's Reply on the Merits and Damages & Counter-Memorial on Jurisdiction and Admissibility, ¶ 22(a), (f).

[99] **R-344**, *Sturgeon Lake Indian Band v. Alberta* (2015), 2015 CarswellAlta 1385 (Alta. C.A.); leave to appeal refused (2016) (**R-345**, *Sturgeon Lake Indian Band v. Canada* (Attorney General), 2015 S.C.C.A No. 394); **R-346**, *Canadian Appliance Source Inc. v. Utradecanada.com Inc.* (2017), 2017 ONSC 4959 (Ont. S.C.J.) ("*Canadian Appliance Source Inc.*"), at para. 18; **R-347**, *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 (Ont. S.C.J.) per Perell J. at para. 25; **R-348**, *Soprema Inc. v. Wolrige Mahon LLP* (2016), 2016 BCCA 471 (B.C. C.A.). *See also*, **R-349**, *Dexter Estate v. Murphy* (2007), 42 C.P.C. (6th) 233 (N.B. Q.B.); **R-350**, *Guelph (City) v. Super Blue Box Recycling Corp*. (2004), 2 C.P.C. (6th) 276 (Ont. S.C.J.); **R-351**, *Weir-Jones v. Taylor* (2013), 2013 CarswellBC 2693 (B.C. S.C.).

[100] **R-346**, *Canadian Appliance Source Inc.*, at para. 20; citing: **R-347**, *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 (Ont. S.C.J.) per Perell J. at para. 26.

	claim on privileged communications and simultaneously prevent its opponent from examining communications relevant to this issue.[101] Contrary to the Claimant's suggestion at paragraph 9.3, it is irrelevant whether the party consents to waiving legal advice. It is also irrelevant whether the party states that it has not waived legal advice. Rather, the test in Canada for a deemed waiver of privilege and an obligation to disclose a privileged communication involves two elements: (1) the presence or absence of legal advice is relevant to the existence or non-existence of a claim or defence, which is to say that the presence or absence of legal advice is material to the lawsuit; and (2) the party who received the legal advice must make the receipt of it an issue in the claim or defence.[102] 4. Many Canadian courts have found that a client waived privilege when their counsel swore an affidavit on their behalf on a matter of substance in the case.[103] For instance, in *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, the Court concluded that privilege had been waived where an affidavit from counsel was filed on a motion for a further and better affidavit of documents, stating: > When a lawyer "enters the fray", and provides evidence in the form of an affidavit, his client is taken to have waived privilege. A party cannot use privilege as a sword, nor can a party disclose a part of a communication which is favourable, while hiding part of a communication which is unfavourable. A party cannot use a solicitor to avoid having to give evidence under oath.[104] 5. In *United States v. Friedland*, the Court concluded that deemed waiver had occurred where an affidavit from a lawyer was filed on a motion for an injunction, stating that the plaintiff had "put squarely in issue the strength of its case against the defendant" and chose to establish the necessary facts to support its case by leading the

[101] **R-352**, *Petro Can Oil & Gas Corp. v. Resource Service Group Ltd*. (1988), 32 C.P.C. (2d) 50 (Alta. Q.B.); **R-353**, *H.R. Doornekamp Construction Ltd. v. Belleville (City)* (1997), 98 O.A.C. 350 (Ont. Div. Ct.). *See also* **R-354**, *Zurich Insurance Co. v. Paveco Road Builders Corp.* (2007), 60 C.P.C. (6th) 354 (Ont. S.C.J.); **R-355**, *Iozzo v. Weir* (2004), 356 A.R. 115 (Alta. Q.B.).

[102] **R-347**, *Creative Career Systems Inc. v. Ontario*, 2012 ONSC 649 (Ont. S.C.J.) per Perell J. at para. 30; **R-346**, *Canadian Appliance Source Inc.*, at para. 19.

[103] **R-356**, *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, 2015 ONSC 4714 (Ont. S.C.J.) at para. 107; **R-346**, *Canadian Appliance Source Inc. v. Utradecanada.com Inc.*, at para. 24. **R-351**, *Weir-Jones v. Taylor* (2013), 2013 CarswellBC 2693 (B.C. S.C.); **R-357**, *Lawless v. Anderson*, 2009 CarswellOnt 6553 (Ont. S.C.J.).

[104] **R-356**, *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, 2015 ONSC 4714 (Ont. S.C.J.) at para. 108.

evidence of its lawyer.[105] The Court also held that as a result of the implied waiver, the defendant was entitled to explore the adequacy of disclosure.[106]

6. Similarly, in *Canadian Appliance Source Inc. v. Utradecanada.com Inc*., a lawyer's affidavit put the strength of the client's case and its state of mind forward in support of the client's positions.[107] The lawyer's affidavit contained numerous statements regarding the substance of the action which the client relied upon to establish its case.[108] The Court noted that "[w]hile it is arguable that any one of the" lawyer's references to legal advice in the affidavit was sufficient on their own or combined with certain others to constitute waiver of privilege, the "collective effect and weight" of the lawyer's statements led to the conclusion that by filing and relying on the legal advice, the lawyer had "entered the fray" and advanced opinions and positions which put the strength of the client's case and its state of mind forward in support of its position. In so doing, the lawyer's affidavit "selectively discloses some, but not all, privileged communications, which is not permitted".[109] Accordingly, the Ontario Superior Court of Justice held that the client had waived privilege over the legal advice and required the client to disclose all privileged communications.[110]

B. APPLICATION OF THE LAW TO THE CLAIMANT

7. As Canada explains below, the Claimant met the two-part test for waiver of privilege over advice it received from [redacted] by: (1) making the presence of this legal advice a relevant and material fact in support of GTH's claims; and (2) making the legal advice that it received from [redacted] an issue in the claim. The Claimant did not simply reference the fact that a privileged communication with counsel occurred, as it suggests at paragraph 9.4. Nor has the Claimant treated the legal advice as separate and distinct from the expectations that GTH formed, as suggested in paragraph 9.5. Instead, in the Claimant's Memorial and through David Dobbie's Witness Statement, GTH and Mr. Dobbie put the Claimant's state of mind at play as informed by the legal advice it received in order to support GTH's positions on two central issues in this arbitration: (a) that GTH had a legitimate expectation that it would be permitted to sell Wind Mobile or transfer Wind Mobile's licences to an

[105] **R-358**, *United States v. Friedland*, 1996 CarswellOnt 3604 (Ont. Gen. Div.), para. 13.

[106] **R-358**, *United States v. Friedland*, 1996 CarswellOnt 3604 (Ont. Gen. Div.), paras. 13-14.

[107] **R-346**, *Canadian Appliance Source Inc.*

[108] **R-346**, *Canadian Appliance Source Inc.*, at para. 37.

[109] **R-346**, *Canadian Appliance Source Inc.*, at para. 38.

[110] **R-346**, *Canadian Appliance Source Inc.*, at para. 42.

Incumbent after the five-year moratorium; and (b) that GTH would be able to obtain full voting control over Wind Mobile.[111]

A. (a) Sale of Wind Mobile and Transferability of Its Spectrum Licences

8. To demonstrate how the Claimant put the content of the legal advice it received at issue, it may assist the Tribunal to briefly outline the Parties' positions on the issues themselves. As the Tribunal is aware, the Claimant maintains that GTH had a legitimate expectation that GTH could sell Wind Mobile to an Incumbent,[112] and that GTH "would be allowed to sell set-aside spectrum licenses [*sic*] to an Incumbent after five years."[113] Canada contends that the Claimant's alleged expectation was not legitimate in the circumstances;[114] and Canada has identified key elements of its legal and regulatory framework that should have informed the Claimant's expectations had it conducted reasonable due diligence.[115] The Claimant has asserted that it did conduct due diligence before investing in Wind Mobile, and that this included obtaining legal advice from [redacted].[116] For instance, Mr. Dobbie states in his Witness Statement:

> I reviewed the licensing framework for the AWS Auction (which contained the rules and conditions for participation in the auction), reviewed publicly available market information, and retained external Canadian counsel, [redacted] [footnote omitted] to advise on these documents and the legal and regulatory framework and policy environment.[117]

9. Mr. Dobbie also refers to legal advice from [redacted] on the regulatory and legal conditions:

[111] Claimant's Memorial on the Merits and Damages ¶¶ 61, 82, 93, 104, 109, 166, 173, 181, 210-211, 345-360.

[112] Claimant's Reply on Merits and Damages, ¶ 286.

[113] Claimant's Reply on Merits and Damages, ¶ 277.

[114] Canada's Counter-Memorial, ¶¶ 404-419.

[115] See Canada's Counter-Memorial, ¶¶ 404-405.

[116] See Claimant's Memorial, ¶¶ 82-85.

[117] **CWS-Dobbie**, ¶ 9 (emphasis added).

> During February 2008, I liaised with Globalive and [redacted] in relation to the regulatory and legal conditions surrounding the potential investment.[118]

10. These conditions would include the issue of whether the Claimant could transfer Wind Mobile's spectrum licenses to an Incumbent after five-years. In describing Canada's documents applicable to the AWS Auction, Mr. Dobbie states:

> I further recall that these documents made clear that there was a five-year restriction on the ability of New Entrants to transfer their set-aside spectrum licences purchased during the AWS Auction to an Incumbent. [Footnote omitted.] We understood this provision to mean that, after the five-year period was up, a New Entrant would be able to sell set-aside spectrum licences to an Incumbent.[119]

11. That is, Mr. Dobbie refers to the fact that [redacted] provided it legal advice on the documents applicable to the licensing framework for the 2008 AWS Auction, and implies that this advice supported its position and understanding of the how the rules would apply after the five-year moratorium. Mr. Dobbie notes that the GTH Investment Committee considered the legal advice in deciding whether to invest in Canada, stating:

> On 3 March 2008, GTH's Investment Committee convened a call to discuss whether GTH should provide the required LOC. In advance of that call, Mr. O'Connor and others circulated background materials including market commentary, [footnote omitted] the materials received from Globalive, [footnote omitted] **and legal advice regarding the legal and regulatory requirements applicable to the proposed investment opportunity**.[120]

12. Mr. Dobbie continues:

> On 6 May 2008, the Investment Committee was provided with briefing materials from the due diligence process, and convened on 7 May 2008 to run through the materials. […]

[118] **CWS-Dobbie**, ¶ 11 (emphasis added).

[119] **CWS-Dobbie**, ¶ 10.

[120] **CWS-Dobbie**, ¶ 13 (emphasis added).

> [T]he Investment Committee had decided to pursue the joint venture with Globalive to participate in the AWS Auction.

13. Thus Mr. Dobbie identifies the subject of the legal advice that the Claimant received, says it shaped GTH's expectations, and refers to it in explaining how the GTH Investment Committee reached its decision to invest in Canada. In its Memorial, the Claimant relies on the testimony of Mr. Dobbie to support its claims concerning its decision to invest in Canada and its expectations in doing so. In describing the steps that GTH took to review the framework and terms for the 2008 AWS Auction, the Claimant cites the paragraphs from Mr. Dobbie's Witness Statement in which he refers to advice provided by [redacted].[121] In explaining how the GTH Investment Committee reviewed the materials describing the regulatory framework and important terms of the 2008 AWS Auction, the Claimant cites the paragraphs in Mr. Dobbie's Witness Statement in which he describes the legal advice provided to GTH.[122] Referencing Mr. Dobbie's testimony, the Claimant states:

> In May 2008, three weeks before the 2008 AWS Auction was scheduled to begin, the Investment Committee convened and reviewed a set of materials summarizing the conclusions from the due diligence process. [Footnote citing Mr. Dobbie's Witness Statement, para. 16.] Following the review of the materials and the ensuing discussions, the Investment Committee made the decision to pursue the joint venture with Globalive to participate in the 2008 AWS Auction." [Footnote citing Mr. Dobbie's Witness Statement, para. 16.][123]

14. Furthermore, the Claimant relies on Mr. Dobbie's testimony described above (which itself refers to the legal advice on which it relied) in explaining its expectations when investing in Canada:

> To inform its decision to invest, GTH reviewed a wide breadth of information detailing the framework Canada had created for the 2008 AWS Auction. [Footnote citing Mr. Dobbie's Witness Statement, para. 10] On this basis, GTH had two key expectations. […]

[121] Claimant's Memorial on Merits and Damages, ¶ 80, citing **CWS-Dobbie**, ¶¶ 7-11.

[122] Claimant's Memorial on Merits and Damages, ¶ 82, citing **CWS-Dobbie**, ¶ 13.

[123] Claimant's Memorial on Merits and Damages, ¶ 85.

> 101. First, GTH expected that Canada would promote a regulatory environment which would afford New Entrants the chance of successfully competing against the Incumbents.
>
> […]
>
> 104. Second, GTH expected that once the Five-Year Rollout Period expired, the prohibition on a New Entrant's ability to transfer Wind Mobile's set-aside spectrum licenses to an Incumbent would expire and GTH would be free to transfer these licenses to an Incumbent."

15. Thus the Claimant put at issue its state of mind based on the legal advice it received, including the advice received from [redacted] by referring to that legal advice in support of its argument that GTH conducted due diligence in determining whether to invest in Canada and therefore had a legitimate expectation that it could transfer Wind Mobile's spectrum licences to an Incumbent after five years.

B. b) Ownership and Control of Wind Mobile

16. As the Tribunal is aware, the Claimant has argued that the national security review process was arbitrary in part because "GTH fully expected that it would be able to obtain full voting control over Wind Mobile"[124] following changes to Canada's ownership and control rules in the wireless telecommunications sector, and that it had an "express right"[125] to do so.[126] Canada has responded that this alleged expectation was not reasonable in the circumstances.[127] To support its arguments on this issue, the Claimant refers to the advice provided by [redacted] in relation to the regulatory and legal conditions surrounding the Claimant's potential investment in a joint venture with Globalive Communications Corp. and how this potential investment could be structured in order to comply with the O&C Rules. Mr. Dobbie states that one of the subjects on which [redacted]

[124] Claimant's Memorial on the Merits and Damages, ¶ 181.

[125] Claimant's Memorial on the Merits and Damages, ¶ 93.

[126] Claimant's Memorial on the Merits and Damages, ¶¶ 345-360.

[127] See Canada's Counter-Memorial, ¶¶ 424-429.

provided advice to the Claimant was "how a potential investment could be structured in order to comply with the O&C Rules".[128] Mr. Dobbie also states that in the course of discussions with [redacted]

> I became aware that there was a policy movement in Canada towards a relaxation of the O&C Rules which would allow a foreign company like GTH to take control of its investment in Wind Mobile, and Globalive ultimately agreed to structure the investment in a way that would give GTH the right to take control if the O&C Rules changed.[129]

17. Mr. Dobbie also refers to the legal advice, and content of the advice, that GTH received with respect to the Claimant's purported right to take voting control:

> The right to take voting control of Wind Mobile should the restrictions on foreign ownership and control be relaxed was very important to GTH, and featured prominently in our internal discussions. It was also specifically raised with Industry Canada by our external counsel, and Industry Canada was entirely comfortable with the provision. I was also informed by external counsel that this provision was a common feature of structures involving non-Canadian entities that Industry Canada was very familiar with.[130]

18. The Claimant relies on Mr. Dobbie's testimony in its Memorial. In describing how it reviewed the O&C Rules, the Claimant cites the paragraphs in Mr. Dobbie's Witness Statement where he refers to the subject matter of legal advice from [redacted].[131]

19. In support of this statement, the Claimant cited paragraph 11 of Mr. Dobbie's Witness Statement, where he described his discussions with [redacted] on the O&C Rules. That is, the Claimant put its state of mind at issue, and cited the legal advice it received to inform that perspective. In fact, and as the Claimant notes above, GTH expressly states that it relied on [redacted] advice, explaining in its Memorial:

> GTH had also received advice from the Canadian law firm, [redacted], [footnote omitted] regarding the structural requirements to comply with the O&C Rules. [Footnote

[128] See **CWS-Dobbie,** ¶ 11.

[129] **CWS-Dobbie,** ¶ 11.

[130] **CWS-Dobbie,** ¶ 21.

[131] Claimant's Memorial on Merits and Damages, ¶ 80, citing **CWS-Dobbie,** ¶¶ 7-11.

	omitted.] On the basis of this information, the Investment Committee decided that GTH should continue its negotiations with Globalive and enter into an agreement to provide the LOC necessary to participate in the Auction. [Footnote omitted.][132] 20. Moreover, in describing the due diligence efforts that GTH took concerning the structure of GTH's investment in Canada, the Claimant cites the paragraph in Mr. Dobbie's Witness Statement in which he describes working with [redacted] to ensure the investment would comply with the O&C Rules.[133] * * * 21. As the collective effect and weight of the statements above show, the Claimant and Mr. Dobbie placed GTH's state of mind in issue with respect to the legal advice that it received by contenting that the legal advice helped to form GTH's expectations when entering the Canadian market. The Claimant identifies the subject matter of that legal advice in an attempt to rely on it in support of GTH's claims that it conducted due diligence prior to investing in Wind Mobile and therefore had a legitimate expectation that GTH could (a) sell Wind Mobile to an Incumbent after five years or transfer the spectrum licenses after five years; and (b) acquire voting control over Wind Mobile. Rather than treating the legal advice merely as a fact, the Claimant implies that the content of the advice supports its allegations that Canada contravened Article II(2)(a). As such, the Claimant put the substance of its legal advice at issue and thereby waived any privilege that may have applied to the requested documents. 22. Canada must therefore be able to test whether the Claimant's expectations were in fact supported by the advice of [redacted] and whether the advice reflected reasonable due diligence by the Claimant. It would be unfair to permit the Claimant to selectively refer to some aspects of privileged communications in support of its substantive case, while refraining from disclosing those communications.

[132] Claimant's Memorial on Merits and Damages, ¶ 82 (emphasis added).

[133] Claimant's Memorial on Merits and Damages, ¶ 84, citing **CWS-Dobbie**, ¶ 15.

Guidance or Order from the Tribunal	1. The Tribunal notes at the outset that neither Party objects to the admissibility of Canada's submission on subject-matter waiver of legal advice although it is raised belatedly.[134] However, GTH disputes the merits of Canada's submission. Both Parties have briefed their respective positions in the Schedule above. 2. GTH's submission that questions of subject-matter waiver raised by Canada are governed by international law cannot be accepted as it would be inconsistent with the Tribunal's previously reached decision on the law applicable to legal privilege.[135] Consistent with its earlier determination, the potential waiver of subject matter privilege shall be decided in accordance with Canadian law, being the law applicable the legal privilege that initially attached to the legal advice provided by Canadian counsel [redacted] in relation to Canadian law. The Tribunal saw no submissions that the event triggering Canada's claim of waiver of privilege, namely GTH's reference to that advice in its claim documents, has occurred under a different law. 3. GTH argues that, whether under international law or under Canadian law, legal privilege over [redacted] advice cannot be deemed to have been waived as GTH only referenced in its case documents the fact that a communication with [redacted] had occurred, but did not disclose a portion of that advice.[136] Canada submits that GTH waived attorney-client privilege, and must produce without redactions all documents containing and discussing advice provided to GTH in relation to whether GTH: (a) would be permitted to transfer Wind Mobile's spectrum licences to an Incumbent after the five-year rollout period; and (b) would be able to obtain full voting control over Wind Mobile following an anticipated relaxation in the ownership and control rules. 4. The Tribunal accepts Canada's definition of subject-matter privilege under Canadian law (also known as deemed waiver) based on the authorities that Canada submitted. In brief, such a waiver is deemed to occur when a party puts its knowledge of the legal advice that it received into issue and attempts to rely on privileged communications in support of its case. The rationale for the deemed waiver is that such party cannot affirmatively use privileged

[134] Canada's attempt to argue in paragraph 1 of its submission above that it referred to this matter in its Letter of 2 November 2018 at Section II.B.2(b) is not convincing. Not only did Canada not refer to [redacted] advice, but its Letter refers in the cited Section to the sharing of information with third parties, which might be read as being relevant to Canada's submissions in Sections I and II of this Schedule, but not to this Section III. In any event, the matter is moot by the absence of objections on admissibility.

[135] PO 5, Annex A, p. 13.

[136] GTH's submission at § 9.5 above.

	communications in its claim while simultaneously preventing the other party from examining those communications.[137] The reference in the IBA Rules to "*affirmative use*" is important in differentiating the situation from one of inadvertent disclosure of privileged communications as a result of an error. There is no suggestion in this arbitration that GTH's reference to the [redacted] legal advice in the Memorial on the Merits and Damages or in Mr Dobbie's witness statement is the result of an error or inadvertence. Accordingly, the precautions in asserting the non-waiver of privilege to which GTH points are irrelevant.[138] Waiver is implied where the privileged material is affirmatively used to support the claim. 5. *Gallo v Canada*,[139] previously relied upon by this Tribunal in PO 5, is a case in point. In that case, Canada had referred in its Statement of Defence to legal advice provided to the government and confirmed that the government acted on that advice.[140] Claimant submitted that Canada had, "*thus, waived any privilege and Claimant should be entitled to the disclosure of the legal advice (...) in part to test whether the Ministry of the Environment was indeed fulfilling its duty to consult.*"[141] The learned tribunal in *Gallo* decided that Canada had implicitly waived privilege because it had made the existence of the legal advice part of its defence.[142] This Tribunal finds significant similarity with GTH's case herein considered, which makes the *Gallo* order a persuasive precedent. 6. After reviewing the evidence cited by Canada in this Schedule,[143] the Tribunal finds that GTH has affirmatively used in its Memorial and its in-house counsel's evidence the legal advice provided by [redacted], thereby going

[137] IBA Rules, article 9(3)(d); Canada's submission in § 3 above, *citing* R-346, *Canadian Appliance Source Inc. v. Utradecanada.com Inc.* (2017), 2017 ONSC 4959 (Ont. S.C.J.).

[138] GTH's submission in §§ 4 *et seq*. above.

[139] RL-251, *Gallo*.

[140] The relevant extract of the Statement of Defence is contained in the order. *Idem* at § 61.

[141] *Idem* at § 33.

[142] *Idem* at § 61.

[143] *See* excerpts of Mr Dobbie's statement cited by Canada in §§ 8 *et seq*. above and excerpts from GTH's Memorial on Merits and Damages cited in §§ 19 *et seq*. above. Particularly telling is the following excerpt of GTH's Memorial on Merits and Damages at § 82, cited by Canada: "*GTH had also received advice from the Canadian law firm,* [redacted]*,* [footnote omitted] *regarding the structural requirements to comply with the O&C Rules.* [Footnote omitted.] *On the basis of this information, the Investment Committee decided that GTH should continue its negotiations with Globalive and enter into an agreement to provide the LOC necessary to participate in the Auction.* [Footnote omitted.]".

	beyond a mere reference to the fact that privileged advice was obtained from counsel. As Canada submits,[144] GTH relied in its evidence and pleadings on the [redacted] legal advice in support of its claims that it conducted due diligence prior to investing in Wind Mobile and therefore had a legitimate expectation that GTH could (a) sell Wind Mobile to an Incumbent after five years or transfer the spectrum licenses after five years being the rollout period, and (b) acquire voting control over Wind Mobile following an anticipated relaxation in the ownership and control rules. By affirmatively using the [redacted] advice in such a way, GTH did not merely refer to its existence as a fact, but implied, as Canada observes, that the content of the advice supports its allegations that Canada contravened the applicable law. As such, GTH is deemed to have waived its entitlement to assert privilege on the relevant documents. 7. As a result, Canada must be permitted to examine and to rely on the legal advice provided by [redacted] for the purpose of its defense. GTH is ordered to disclose the relevant documents forthwith and is permitted to redact terms of the advice that do not relate to items (a) and (b) in the preceding paragraph as long as the redactions do not create a misleading impression of the unredacted parts of the advice.

[144] Canada's submission at § 21 above.