Legal Privilege for In-House Counsel

"BEST PRACTICES FOR PREVENTING DISCLOSURE OF INTERNAL COMMUNICATIONS"

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Overview

- Privilege primer
- Investigations
- Cross border issues
- Managing email
- Board matters

Privilege Primer

A privilege is a “privilege from disclosure”.

– Supreme Court of Canada *M.(A.) v. Ryan*, [1997] 1 SCR 157

It means the power to keep a communication secret and not have to reveal it to anyone.

– Alberta (Provincial Treasurer) v Pocklington Foods Inc., 1993 ABCA 69

Privilege is a rule of evidence and is a matter of substantive law. A lawyer’s duty to keep a client’s confidences is an ethical obligation.

Varieties of Privilege

Solicitor Client Privilege

Protects communications between a lawyer and a client

Litigation Privilege

Protects records and communications created for the dominant purpose of litigation

Settlement Privilege

Protects communications aimed at negotiating the resolution of a dispute

Common Interest Privilege

Protects privileged information shared amongst parties with a common interest in an outcome

Solicitor Client Privilege - Rationale

The purpose is to protect the relationship between solicitors and clients.

"Society has entrusted lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge those duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting ***confidential relationship between solicitor and client*** *is a* ***necessary and essential condition of the effective administration of justice****."*

- Supreme Court of Canada, *Blank v Canada (Minister of Justice)*, 2006 SCC 39

Solicitor Client Privilege – Scope

Three Elements

- Solicitor client privilege applies to:
  1) All communications (both written and oral) between a client and his or her lawyer;
  2) That are intended to be made in confidence; and
  3) Involve the seeking or giving of legal advice.

- Solicitor client privilege applies when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than a business counsellor or in some other non-legal capacity
- The legal advice need not involve any contemplation of litigation

- Canada (Privacy Commissioner) v Blood Tribe Department of Health, 2008 SCC 44

Solicitor Client Privilege – Duration and Degree

- **Permanent** – “once privileged, always privileged” unless it is waived
- Solicitor-client privilege **belongs to the client**
- Solicitor-client privilege must be **as close to absolute as possible** to ensure public confidence and retain relevance. As such, it will only **yield in certain clearly defined circumstances**, and does not involve a balancing of interests on a case-by-case basis

  – *R v McClure,* 2001 SCC 14

- The exceptional circumstances in which solicitor-client privilege can yield are:
  - Innocence at stake
  - Communications that are themselves criminal or involve facilitating a crime
  - Public safety is at risk
  - Determining the validity of a trust agreement after the death of the settlor

Solicitor Client Privilege – In House Counsel

One thing is clear: **the fact that [a lawyer] is a salaried employee [does] not prevent the formation of a solicitor-client relationship** and the attendant duties, responsibilities and privileges. This rule is well established:

> *"**Many barristers and solicitors are employed as legal advisors, whole time, by a single employer.** Sometimes the employer is a great commercial concern…They are regarded by the law as in every respect in the same position as those who practice on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and or etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. **They and their clients have the same privileges…"***

- Lord Denning in *Crompton (Alfred) Amusement Machines Ltd v Comrs. Of Customs and Excise (No. 2)*, [1972] 2 All ER 353 (CA)

Cited approvingly in :
- *R v Campbell*, [1999] 1 SCR 565

Settlement or “Without Prejudice” Privilege

Rationale:

“…parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings. They should … be encouraged freely and frankly to put their cards on the table.”

- *Cutts v. Head,* [1984] 1 All E.R. 597 (Eng. C.A.)

Cited in:

- *Sable Offshore Energy Inc v Ameron International Corp,* 2013 SCC 37

Settlement Privilege – Scope and Duration

Settlement Privilege applies to communications where:

a) The parties are engaged in, or contemplating, a litigious dispute;

b) There is an express or implied intent that the communication would not be disclosed to the court in the event negotiations fail; and

c) The purpose of the communication must be to attempt to effect a settlement.

- *Royal Bank of Canada v Independent Electric and Controls Ltd*, 2019 ABQB 217

- Successful negotiations, including the settlement amount, are privileged.
- The settlement privilege belongs to both parties, and cannot be unilaterally waived.

Settlement Privilege – Scope and Duration

An exception to privilege exists where a defendant can show, on balance, a competing public interest outweighs the public interest in encouraging settlement.

Such exceptions to settlement privilege include:

a) Prevention of double recovery;

b) The communications are unlawful, containing for example threats or fraud;

c) The communications are required to prove that settlement was reached, or to determine the exact terms of the settlement; and

d) In relation to costs.

The Effect of Labelling Communications "Without Prejudice"

*"**The notation "without prejudice" is not conclusive in establishing privilege**. If the contents of a communication are truly in furtherance of settlement, and therefore privileged, it makes no difference whether the communication is marked "without prejudice" or not. A communication that is not in substance privileged does not become so just because one party places "without prejudice" on it. Likewise, the absence of the words "without prejudice" means nothing if the communication is truly privileged."*

- Alberta Court of Appeal, *Bellatrix Exploration Ltd v Penn West Petroleum Ltd,* 2013 ABCA 10

Common Interest Privilege

- **Advisory** (or “Transactional”) common interest privilege
  - Where two parties jointly consult one lawyer or where two parties exchange privileged information with one another in pursuit of a common goal (i.e., a merger), privilege can be maintained according to a joint retainer or common interest exception to the third-party waiver rule

- **Rationale**
  - “Those engaged in commercial transactions must be free to exchange privileged information without fear of jeopardizing the confidence that is critical to obtaining legal advice.”

    - *Fraser Milner Casgrain LLP v. Minister of National Revenue*, 2002 BCSC 1344

  - Has been recognized in the transactional or planning context but does not apply where parties are adverse in interest

    - *Imperial Tobacco Canada Ltd. v. The Queen,* 2013 TCC 144

Common Interest Privilege

- Frequently used to attempt to retain privilege over legal opinions shared amongst a corporate group. Care must be taken to define the common interest and to consider whether the same legal principles will apply in other jurisdictions (e.g., a Canadian parent with subs in other countries)

- **Litigation** (or “Joint Defense”) common interest privilege
  - Privilege may be preserved despite disclosure to certain third parties
  - Disclosures to person who share “selfsame interest” but are not necessarily parties to the action
  - Parties who share or anticipate litigation against a common adversary on the same issue

    - *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31

Advisory Common Interest Privilege

IGGillis Holdings Inc v Canada (National Revenue), 2016 FC 1352

- Series of transactions between IGGillis Holdings and Ian Gillis (Gillis) and Abacus Capital Corporations Mergers and Acquisitions (Abacus).
- Transactions were outlined in a step plan that had been prepared with input from legal counsel and advisors to both Gillis and Abacus (the Memo). No joint retainer.
- After the transaction closed, the Canada Revenue Agency (CRA) sought to obtain the Memo from Gillis and Gillis refused to provide it.
- CRA brought a compliance application in Federal Court under section 231.7 of the *Income Tax Act* and was successful.

Advisory Common Interest Privilege

IGGillis Holdings Inc v Canada (National Revenue), 2018 FCA 51

- Federal Court of Appeal allowed the appeal and **confirmed the availability of common interest privilege in the context of a transaction**:
  - The Court noted policy considerations:
    - "When dealing with a statute as complex as the *Income Tax Act*, it may well be more efficient and the interests of the respective clients may well be better served if the lawyers collaborate on the opinion that is to be provided in relation to the application of that statute to the series of transactions to be completed by the parties."
- Leave to appeal to the SCC was dismissed with costs October 25, 2018

Common Interest Privilege – Best Practices

- Use of common interest privilege agreements
  - Include confidentiality provisions, but do not rely only on CAs
  - Document that the sharing is necessary or mandatory
  - Define the common interest
- Ensure relationships are clearly understood by counsel and clients
- Document relationships – consider joint retainers if retaining external counsel
- Example of sharing tax opinions

Privilege and Other Advisors

- Starting point is that privilege does not extend to non-lawyers in Canada – strangers to the privilege
- The Accountant as Agent
  - Use of agency agreements
  - Managing privilege

- *Susan Hosiery Ltd. v. Minister of National Revenue, 69 D.T.C. 5278 (Ex. Ct.)*

Privilege Across Borders – Best Practices

- Privilege within Canada
  - Provincial differences
- Privilege between Canada and other countries
  - Do not assume other jurisdictions enjoy the same robust protection of privilege that Canada does
  - In the tax context, increasingly, taxpayers are well-advised to assume that information collected by one tax authority will be shared among all tax authorities.
  - *Silver Wheaton*
- Europe
  - Privilege not as broadly recognized as in Canada

Cross-border and Crossing Borders – Issues Privilege at the USA Border

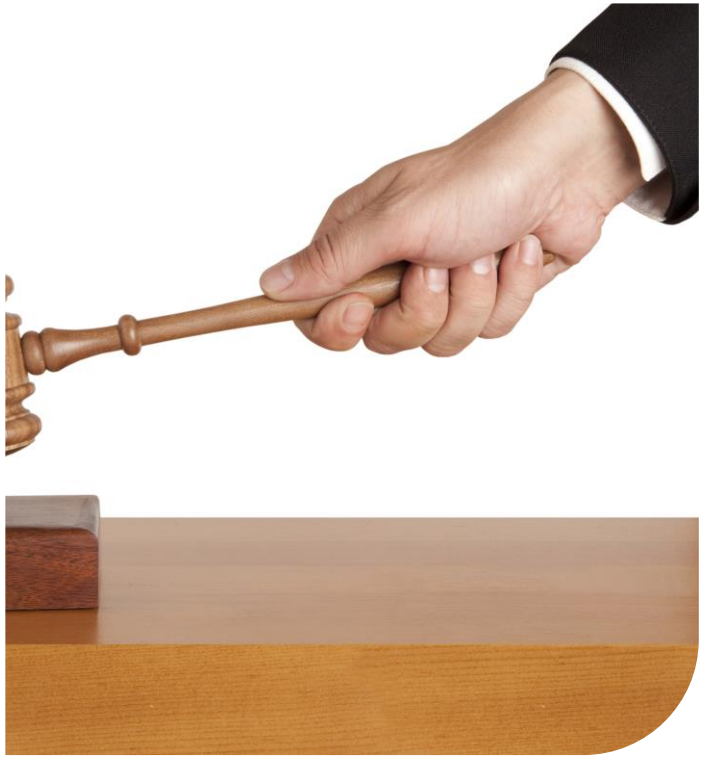
- **Travelling into Canada:** When crossing the border, digital devices are considered “goods” under the *Customs Act* and the *Immigration and Refugee Protection Act*.
  - Devices can be searched including documents, e-mails, or messages that would otherwise be protected under solicitor-client privilege.
  - Refusal to provide a password or examination of the device can lead to the device being detained.
  - Internet connectivity must be disabled before a device is searched.

- **Travelling into the USA:** U.S. Customs and Border Protection can demand a password to open a device without probable cause.
  - Traveller’s devices can be downloaded to a hard drive if national security purposes are cited
  - If the device cannot be accessed it can be detained up to five days
  - Agents cannot use a device to access remote files (e.g. cloud files or online documents)
  - If a lawyer claims privilege, a border agent is required to consult with the U.S. Attorney’s Office to determine whether files should be segregated.

Litigation Privilege

Litigation privilege is aimed at **protecting the adversarial process**, as opposed to the solicitor-client relationship. It is based upon the need for a **protected area to facilitate investigation and preparation of a case** for trial by the adversarial advocate.

- *Blank v Canada (Department of Justice),* 2006 SCC 39



"*Proper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undo and needless interference….Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own.*"

- *Hickman v. Taylor*, 29 U.S. 495 (C.A. 3rd Cir., 1947)

Litigation Privilege – Scope and Duration

- Litigation privilege protects communications and documents created for the dominant purpose of preparing for existing or reasonably apprehended litigation.
- Litigation privilege is not permanent. It lapses when the specific litigation for which the documents were prepared, and any related litigation, ends.
- Related litigation includes separate proceedings that involve the same or related parties, arise from the same or related cause of action, or raise the same factual issues.
- Communications protected by litigation privilege are not restricted to communications between a solicitor and client. It can include:
  - communications between a solicitor and third party (such as an expert),
  - between an unrepresented litigant and a third party, and
  - documents that are of a non-confidential and non-communicative nature, such as counsel notes.

Investigations at the Instruction of Counsel

Two recent decisions involving investigations conducted at the instruction of in-house counsel.

- *Alberta v Suncor Energy Inc*, 2017 ABCA 221
  - Leave for appeal dismissed May 3, 2018, SCC No. 37777

- *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289

Investigations at the Instruction of Counsel

Alberta v Suncor Energy Inc.

April 20, 2014 workplace fatality near Fort McMurray

- In-house counsel immediately concluded that litigation was a possibility, began an internal investigation, directed team to segregate the investigation documents and endorse all material as privileged and confidential
- Occupational Health and Safety (OHS) officers demanded
  - Copies of witness statements taken by Suncor investigators
  - Copies of notes, records, photos, videos or other documents taken or collected by Suncor
- *Occupational Health and Safety Act* requires Suncor to:
  1. Carry out an investigation into the circumstances of the accident,
  2. Prepare a report outlining the circumstances and any corrective action taken to prevent a recurrence
  3. Ensure that a copy of the report is readily available for inspection by OHS

Investigations at the Instruction of Counsel

Alberta v Suncor Energy Inc

The Court of Queen's Bench held:

"…the dominant purpose for Suncor's conduct of the subject investigation into the Accident was in contemplation of litigation. This finding invariably and logically leads to the collateral finding that, within the context of Suncor's internal investigation that was carried out in anticipation of litigation, ***the information and documents created and/or collected during the internal investigation with the dominant purpose that they would assist in the contemplated litigation, are integrally covered by litigation privilege****."*

The Court of Queen's Bench decision was appealed.

Investigations at the Instruction of Counsel

Alberta v Suncor Energy Inc

The Court of Appeal allowed the appeal, holding:

- *"The chambers judge's conception of privilege would extend to the entirety of the internal investigation file, regardless of the genesis of the individual documents or bundles of like documents."*
- The inquiry requires examination **"document by document"** or group of like documents to determine the purpose behind its creation.
  - "[T]he inquiry must focus on the purpose for preparing or creating the material, not the purpose for obtaining it.
- *"Suncor cannot, merely by having legal counsel declare that an investigation has commenced, throw a blanket over all materials "created and/or collected during the internal investigation" or "derived from" the internal investigation, and thereby extend solicitor-client or litigation privilege over them."*
- Leave to Appeal to SCC refused.

Investigations at the Instruction of Counsel

Canadian Natural Resources Limited v ShawCor Ltd

January 3, 2009 – blow-out of a well in CNRL's Primrose East Field

- Following the blow-out, CNRL elected to operate the Pipeline at higher than usual temperatures
- Mid-January 2009 – early February 2009: CNRL conducts airborne thermal scan and excavates several "hot spots" where snow had melted along the pipeline right of way
- February 4, 2009: CNRL's in-house counsel is asked to provide legal advice regarding further investigation and testing of the Pipeline
- February 5, 2009: counsel sends out an e-mail to the CNRL employees conducting the Pipeline investigation advising that the investigation would henceforth be conducted under the guidance of legal counsel
- Protocol established to funnel all reports and communications regarding the investigation produced after February 4, 2009 to the legal department

Investigations at the Instruction of Counsel

Canadian Natural Resources Limited v ShawCor Ltd

The Court of Queen's Bench:

- CNRL commenced an action against ShawCor and others alleging faulty design, construction and installation of the Pipeline, claiming a failure of the Pipeline's coating and insulation system. The Defendants claim that the failure was the result of CNRL operating the pipeline at high temperatures.
- In its records production, CNRL produced its investigative and testing records relating to the Pipeline up until February 4, 2009, but claimed solicitor-client and litigation privilege on those records after that day.
- CNRL produced an Affidavit stating that by February 4, 2009 when in-house counsel was consulted, litigation was "obvious".

Investigations at the Instruction of Counsel

Canadian Natural Resources Limited v ShawCor Ltd

- The Court of Queen's Bench held that by February 4, 2009, CNRL's investigation had moved from a preliminary stage to the point where its dominant purpose in creating records thereafter was to prepare for litigation. The Court accepted that CNRL's investigation and testing records generated after February 4, 2009 were protected by solicitor client or litigation privilege.

- The Court of Queen's Bench decision was appealed.

Investigations at the Instruction of Counsel

Canadian Natural Resources Limited v ShawCor Ltd

The Court of Appeal allowed the appeal, holding:

- A record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created.
- Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege:

  *"…**the purpose behind the creation of a record does not change simply because the record is forwarded to, or through, in-house counsel, or because in-house counsel directs that all further investigation records should come to him or her.** Or even because a decision has been made to pursue litigation. One must always look to the particular record at issue and determine the dominant purpose behind its creation. After all, litigation privilege must be established **document by document**."*

Investigations - Best Practices

- Implement a privileged investigation protocol at the direction of counsel ASAP following the incident.
- Consider engaging external counsel immediately and including them in the protocol.
- Be selective about claims of privilege.
- Engage all experts assisting with the privileged investigation through external counsel.
- Set up secure server/folders through legal counsel for privileged investigation materials.
- Additional option in OH&S incidents – set up 2 separate investigations, one privileged and one to complete the s. 40 report.

Email and Privilege

- Not all in-house counsel communications are privileged – **must entail the seeking or giving of legal advice**
- Once established, privilege "attaches to the continuum of communications in which the solicitor provides advice" and "[applies] with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law"
- Problems can arise with email strings…
  - *British Columbia (Attorney General) v Lee*, 2017 BCCA 219
    - Solicitor provides "strategic" advice in initial email thread
    - In house counsel removed from thread – still privileged?
    - The severance of some communications or parts of communications can only occur when there is no risk of revealing legal advice.
      - Leave to appeal to SCC dismissed with costs, December 14, 2017

Email and Privilege – Best Practices

- Ensure all communications are directed to legal counsel – copying the legal counsel may not be sufficient to ensure that privilege is maintained.
- Clearly label all privileged records “Privileged and Confidential” and store separately from non-privileged records.
- DON’T OVER LABEL
- Restrict privileged emails (and meetings and other communications) to “need to know” group.
- Be clear with business clients when emails contain legal advice and remind them not to forward your emails.
- Do not combine business and legal advice in one email.
- When are you truly acting as a legal advisor?
  - Only with legal advice and litigation prep AND must be shared in a confidential setting.

Board Matters – Best Practices

- Counsel's role at a Board meeting may or may not be to provide privileged legal advice
- See, for example, *Klemke Mining Corp. v. Shell,* [2002] A.J. 16 (Q.B.)
- Use of in camera sessions - not the same as privileged
- Third parties/guests should not be present for privileged discussions
- Must be specifically legal advice or in contemplation of litigation
- Minutes
  - Consider no minutes for privileged discussions

Privilege Best Practices: Take-Aways

1. Know your role – legal advisor or business advisor?
2. Label privileged documents appropriately – Don’t over label
3. Communicate with business clients about privilege issues
4. Beware common interest privilege issues
5. Educate your teams to think about privilege and to evidence an intent to create and maintain privilege

Questions?

Thank You

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