Legal Privilege

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LEGAL PRIVILEGE

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This guide to solicitor-client privilege and litigation privilege does not replace specific legal advice. Our lawyers at Bennett Jones LLP would be happy to provide you with legal advice particular to your circumstances.

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Privilege provides special protection that exempts certain documents and other forms of communication from having to be disclosed in legal proceedings. Its protection is powerful, but it can be easily lost if the privileged information is handled incorrectly. This guide has been created to provide basic information about privilege in Canadian law and suggest ways to protect it. For example, the following steps can be taken to better protect privilege:

1. Identify privilege issues and privileged information early on.
2. Label privileged documents appropriately and judiciously.
3. Ensure where possible that potentially privileged communications flow through a lawyer.
4. Manage the dissemination of documents in respect of which privilege may be asserted, both to ensure that the necessary element of confidentiality is not lost and to avoid inadvertent disclosure.
5. Conduct sensitive external or internal investigations under the direction of counsel, preferably external litigation counsel.
6. Have counsel retain any experts that are engaged for the investigation.
7. Ensure care is taken with email and with who is copied on the email.
8. In-house counsel should take steps to segregate or otherwise differentiate files and documents in which the lawyer performs non-legal functions so that the role of the lawyer is clear.

We begin with an overview of the two kinds of legal privilege, legal advice privilege (also known as solicitor-client privilege) and litigation privilege, and then discuss privilege in the context of in-house counsel. Next, we explain how privilege works in some common specific situations before turning to a discussion of how privilege can be lost. Finally, we provide a list of precautions that can help to maintain privilege.

A. Privilege

Privilege exempts documents and other forms of communication from having to be disclosed in legal proceedings. Canadian law generally requires all relevant and material evidence relating to the issues before a court to be disclosed to all parties. This requirement is subject to a number of exceptions in which Canadian law recognizes that the public interest in preserving and encouraging particular confidential relationships justifies a departure from the general rule that all relevant and material evidence be disclosed. Canadian law allows such communications to remain privileged and be exempt from disclosure.

Legal privilege is one of the most well-recognized privileges. By successfully invoking legal privilege, a person is entitled to resist the disclosure of information or the production of documents to which an opposing litigant would otherwise be entitled (*Canada (Privacy Commissioner) v Blood Tribe Department of Health*, SCC, 2008 [*Blood Tribe*]). Canadian law generally recognizes two categories of legal privilege: legal advice privilege and litigation privilege. Legal advice privilege prevents disclosure of information communicated to the lawyer for the purpose of obtaining legal advice, as well as information communicated to the client by the lawyer in order to give legal advice. Litigation privilege protects any documents or communications created for the dominant purpose of preparing for existing or anticipated litigation. These two categories of legal privilege may overlap on occasion but they, at least theoretically, operate quite separately.

1) Legal Advice Privilege

Legal advice privilege protects communication between lawyers and their clients when created for the purpose of giving legal advice. Canadian law recognizes that the proper administration of justice requires that people have the ability to be completely candid with their lawyers and to be secure in the knowledge that any such communication will not have to be disclosed in legal proceedings (subject to certain narrow exceptions, such as the communication cannot be to further the commission of a crime or a fraud, or pose a serious, imminent threat to public safety). The requirements of legal advice privilege are:

1. the communication must be between the lawyer and the client (written or oral);
2. the communication must be connected to obtaining legal advice, not business or other non-legal advice;
3. the communication must be confidential (e.g., no strangers present); and
4. there must have been no waiver of confidentiality (e.g., subsequent disclosure to strangers).

It is important to note that privilege does not attach to every communication between the lawyer and the client. Merely having a lawyer participate in the

discussion is not enough to cloak the communication with legal advice privilege. The communication must involve the provision of legal advice. However, the privilege extends to all forms of communication including faxes, voicemail, email and other information stored digitally.

The relevant communication or document need not contain the actual legal advice, provided it forms part of an exchange to obtain or receive legal advice. Unsolicited legal advice is also protected, provided there is a solicitor-client relationship.

Whether legal advice privilege incudes communication that is purely factual depends on the circumstances. For example, it has been held that a lawyer's real estate transaction file and its related records, including its accounts and ledgers, were not protected by legal advice privilege because they were records of particular actions, not communications for the purposes of seeking or giving legal advice (*Westra Law Office (Re)*, ABQB, 2009).

Further, as noted, the communication must be kept confidential. Legal advice privilege requires: that a client communicate in confidence to a lawyer; generally that no other parties be present; and that the advice not be shared with other parties. However, the privilege, unless waived, lasts forever, even surviving the death of the client.

Legal advice privilege can be limited by a statute if there is a clear and unequivocal intent to do so, and it is absolutely necessary to do so to implement the statutory scheme. Statutory provisions which limit privilege are controversial and subject to constitutional challenges on these grounds (*Canada (Attorney General) v Chambre des notaires du Québec*, SCC, 2016; *Canada (National Revenue) v Thompson*, SCC, 2016).

2) Litigation Privilege

Litigation privilege protects communication among lawyers, their clients, and third parties that has the dominant purpose of preparing for current or anticipated litigation. It arises from the adversarial system of litigation in Canada, which allows each party to control fact-presentation before the court and decide for themselves which evidence and what means each will use to prove their case, without fear that their preparations will have to be disclosed. The requirements for litigation privilege are:

1. there must have been current litigation or a reasonable contemplation of litigation at the time of the communication;
2. the dominant purpose for the creation of the document must have been its intended use in actual or reasonably contemplated litigation;
3. the communication must have been confidential; and
4. there must not have been any waiver of confidentiality.

The dominant purpose test has now been generally accepted in Canada and has been the source of many of the disputes over litigation privilege. Dominant purpose means that the primary purpose of the communication, at the time it occurred, was to prepare for litigation, either existing or anticipated. Litigation need not be the only purpose of the communication, but it must be the primary purpose. Conversely, it is not sufficient if preparing for litigation was one of several purposes of the communication: it must be the dominant purpose.

Therefore, if handled correctly, material prepared for the dominant purpose of litigation may still be used for secondary, non-litigation purposes. In order to use the communications or documents for multiple purposes, care must be taken to demonstrate that the dominant purpose remains litigation, notwithstanding the other uses of the material (for example, by employing explicit warnings on the documentation that it is prepared for litigation and by preserving its confidentiality).

The communication need not be related to the preparation of legal advice, and the involvement of lawyers is not strictly required. Any communications or documents created for the dominant purpose of preparing for litigation will attract the privilege, regardless of whether or not a lawyer was involved in their creation. However, if the document is shared with parties outside those immediately involved in its creation, the privilege may still be lost. The privilege will also end when the litigation, including all closely related proceedings, is over (*Blank v Canada*, SCC, 2006).

Like legal advice privilege, litigation privilege can be limited by statute, but only if the provision uses clear, explicit and unequivocal language (*Lizotte v Aviva Insurance Company of Canada*, SCC, 2016).

3) Similarities and Differences

There are many similarities between the two types of legal privilege. Both extend to all forms of communication including faxes, voicemail, email and other information stored digitally. Even statements of account rendered by a law firm are generally privileged. Also, both categories of privilege require an element of confidentiality in the communication. Privilege can be lost if one fails to maintain confidentiality, and one cannot normally maintain privilege over something that is not confidential in nature. Additionally, both types of privilege may not apply to all proceedings, only those of a judicial or quasi-judicial nature. An Alberta decision held that litigation privilege did not apply to preparations for proceedings before the Municipal Tax Assessment Review Board (*Alberta Treasury Branches v Ghermezian*, ABQB, 1999).

Despite these similarities, there are three important differences between the two types of legal privilege. First, legal advice privilege exists until waived (unless disclosure is required by one of the narrow exceptions, such as to prevent a serious threat to public safety) whereas litigation privilege ends with the litigation. Second, legal advice privilege always requires a lawyer, while litigation privilege can exist

without a lawyer's involvement so long as the document was created with the dominant purpose of preparation for litigation, either existing or anticipated. Finally, although both types of privilege normally require confidentiality, litigation privilege can sometimes attach to non-confidential documents that are assembled for the purposes of litigation, at least with respect to the copies of such documents in the hands of the lawyer or party preparing for litigation. This is because the combination of the documents may disclose the party's litigation strategy.

B. Privilege and In-House Counsel

In Canada, both categories of legal privilege should apply equally to the advice and activities of in-house lawyers as they do to the advice and activities of external lawyers. In *R v Campbell*, [1999], 1 SCR 565 [*Campbell*], the Supreme Court of Canada expressly endorsed the right of in-house counsel to claim privilege. The in-house designation did not affect "the creation or character of the privilege." This position was confirmed in *Pritchard v Ontario*, SCC, 2004.

With respect to legal advice privilege, in-house lawyers must be acting in their capacity as legal advisors. A lawyer cannot assert this privilege over non-legal advice, for example, business advice given to a client. The Supreme Court of Canada in *Campbell* noted that government lawyers might be called upon for policy advice that had nothing to do with legal matters. The Court recognized that a comparable range of functions existed for in-house lawyers. However, where the purpose is to provide legal advice, legal advice privilege can be claimed.

In practice, however, some caution must still be applied when relying on legal advice privilege with respect to in-house lawyers. Courts will more readily find that in-house lawyers were providing non-legal business advice to their corporations than if external lawyers were involved. In important or particularly sensitive matters, it is wise to have the advice, and the discussions and investigations leading up to the advice, procured through external counsel.

If or when an in-house lawyer engages in non-legal functions, steps should be taken to segregate or otherwise differentiate the lawyer's legal work from the lawyer's non-legal work, for example by keeping separate files for each. This will allow the in-house counsel to better demonstrate which files are protected by legal privilege and which are not. Where mixing in-house roles within a file is unavoidable and the matters are particularly sensitive, avoid documenting legal advice in the same document as business advice, and, where appropriate, inform the reader why you are doing this

C. Privilege and Common Situations

There are some specific circumstances where questions of privilege often arise. The discussion below concerns whether and how privilege applies in five common situations.

1) Accident and Serious Incident Investigations

One of the most contentious aspects of privilege concerns the investigation of accidents and similar incidents, such as suspected environmental contamination. Accident reports, investigators' reports, and similar exchanges most often raise the question whether they are privileged. In order for these documents to be protected by litigation privilege they must be prepared for the dominant purpose of litigation or contemplated litigation. Courts have said that the dominant purpose is not to be coloured by reference to subsequent developments. If litigation later materializes, it does not retroactively characterize the report as having been prepared for the dominant purpose of litigation if that was not the original intention.

In the wake of an incident there will often be an immediate investigation to determine the cause and to attempt to determine what should or must be done as a result. Documents generated as part of this initial investigation may not be privileged, but at some point the initial investigation may give way to an investigation in order to prepare for litigation. There is no set point at which this occurs. Instead, the point at which an initial investigation becomes an investigation for the dominant purpose of litigation begins may depend on what is discovered during the initial investigation. In any event, though, a review must be undertaken on a document by-document basis as to whether it was created for the dominant purpose of litigation (*Canadian Natural Resources Ltd v ShawCor Ltd*, ABCA, 2014).

However, while the issue is usually litigation privilege, it may also be appropriate to claim legal advice privilege if a lawyer is involved in directing the investigation. Legal advice privilege is less strict in its test of the document's purpose, but stricter against the involvement of third parties (*SNC-Lavalin v Citadel General Assurance*, Ont SCJ, 2003).

The involvement of in-house counsel in such investigations, instead of external counsel, increases the complexity of the analysis. In-house counsel may be more readily seen as having a separate, non-legal role as an investigator and not as a lawyer (*College of Physicians v BC*, BCCA, 2002). However, when a lawyer is involved, any communications containing legal advice should be protected by legal advice privilege, even if the investigation itself is not found to be for the dominant purpose of litigation and thus not subject to litigation privilege.

2) Fraud

Both legal advice privilege and litigation privilege will not protect communications in furtherance of a crime or fraud, whether the lawyer was aware of this or not. This loss of privilege applies only to fraud or criminal conduct and actions. It does not apply to actions which are merely unlawful, such as torts or breaches of contract. Privilege will also not arise where the document itself is fraudulent or criminal in nature.

3) Settlement and Without Prejudice Negotiations

The privilege which attaches to settlement negotiations and without-prejudice exchanges is a different privilege that is distinct from legal advice privilege and litigation privilege: settlement privilege. "Without prejudice" communications are protected with privilege to serve the societal interest of promoting settlement and avoiding or limiting litigation where possible. It is not even necessary that lawyers be involved for a successful claim of settlement privilege.

However, litigation or contemplated litigation must be involved to successfully claim this privilege as it exists to protect confidential negotiations made to settle litigious disputes. It does not apply to other settlement negotiations, for example, negotiations to resolve a contractual dispute, unless the dispute has progressed to the stage that litigation is contemplated or underway.

While documents are commonly labeled "without prejudice" to invoke this privilege, it is not strictly necessary. However, labeling a document "without prejudice" assists with demonstrating a party's intentions to assert the privilege. Conversely, merely labeling a document "without prejudice" does not make an otherwise unprivileged document privileged.

There must be some potential for compromise or negotiation in, or reasonably connected to, the document for it to be protected (*Bellatrix Exploration Ltd v Penn West Petroleum Ltd*, ABCA, 2013 [*Bellatrix*]). The privilege will be given a broad scope and will attach not only to communications involving offers of settlement, but also to those which are reasonably connected to the negotiations. Settlement does not have to be the only purpose of the communications for the privilege to apply (*R v Delchev*, ONCA, 2015 [*Delchev*]). However, there must be some good faith attempt at negotiations and potential for settlement.

Once a settlement is successfully concluded, this privilege will attach to the settlement agreement itself (*Sable Offshore Energy Inc v Ameron International Corp*, SCC, 2013 [*Sable Offshore*]). Thus, not only are the negotiations leading up to a settlement privileged, whether or not a settlement is reached, but so too are the terms of any settlement agreement that is achieved, including the final amount agreed to.

There are exceptions to settlement privilege where a competing public interest outweighs the public interest in encouraging settlement. For example, allegations of misrepresentation, fraud or undue influence, and preventing a plaintiff from being overcompensated have been said to create exceptions.

The privilege belongs to both parties and cannot be unilaterally waived or overridden (*Bellatrix*). However, if there is a dispute over whether a binding settlement was made, or over the interpretation of the settlement, then privilege may be lost on the basis that the communications are relevant to establishing the existence of the agreement or as an aid in its interpretation (*Comrie v Comrie*, SKCA, 2001).

4) Lawyers from Other Jurisdictions

Legal advice privilege may protect communication only with lawyers who are lawfully entitled to practice law in the jurisdiction for which they provided the advice (*Canada v Newport Pacific Financial Group*, ABQB, 2010). This would mean that in regard to providing advice on Alberta law, only communications with an Alberta lawyer would be protected by legal advice privilege. This area is controversial, and other cases have protected communication with a foreign lawyer in Canada regarding Canadian law even though the lawyer is not entitled to practise law in Canada.

To protect against this controversy, in important or sensitive matters, it is best to seek such advice only from lawyers qualified to practice in Alberta, or, at a minimum, for the foreign lawyer to be an intermediary between the client and an Alberta lawyer so that the role of the foreign lawyer is to provide information or instructions to the Alberta lawyer. Further, in the reverse situation in which Alberta lawyers are asked to provide advice in areas governed by foreign law, it would be prudent for the Alberta lawyer to consult with lawyers qualified to practise in that foreign law, so that the Alberta advice is preparatory to obtaining that foreign advice.

Advice by a foreign lawyer on foreign law that is provided in Alberta should also be protected. More controversial is whether such foreign legal advice is protected if given outside of Alberta (and particularly if given outside of Canada). Traditionally, legal privilege has been characterized as a procedural matter for conflicts of laws analysis, meaning that its existence will be governed by the law of the place in which the litigation occurs. Thus, even if the advice is not privileged in the foreign jurisdiction, it would still be protected in Alberta proceedings. However, the Supreme Court of Canada in *R v National Post*, SCC, 2010 stated that legal advice privilege is a matter of substantive law, which would, under traditional conflict of laws rules, mean that its existence would be governed by foreign law, not Alberta law, in Alberta proceedings. Such a characterization would result in the risk of foreign legal advice provided outside of Alberta or Canada not being recognized in Alberta proceedings as privileged, depending on the particular laws of the foreign jurisdiction and the facts of the particular case. These areas remain uncertain under Alberta law.

5) Non-legal privileges

Some forms of communications with non-lawyers, outside of existing and potential litigation, are also protected by privilege. Public interest privilege, marital privilege, and medical profession privilege are all other forms of privilege recognized in Canada. These types of non-legal privileges are protected by different principles than legal privilege, defined by different tests, and are generally offered less protection than legal privilege by Canadian courts.

Recently, for instance, communications between clients and their patent agents and between clients and their trademark agents have become privileged under statute in much the same way as lawyer-client communications are protected by legal advice privilege at common law.

D. Waiver of Privilege

Barring consent of the client to disclosure, legal advice privilege remains in effect forever, while litigation privilege exists until the conclusion of the litigation, including any related proceedings. However, both kinds of privilege will be lost where the privilege-holder waives the privilege, either explicitly or implicitly. Waiver generally requires that the client be aware of the privilege and intends to give up the benefit. However, privilege can be lost through carelessness, specifically due to loss of confidentiality through disclosure of the information. Not all inadvertent acts of disclosure will constitute a waiver of privilege, though there does not have to be a clear intent to waive privilege before it can be lost. In a share-purchase transaction, privilege may follow the company purchased, unless the parties have negotiated a provision to the contrary in the contract. Without such a provision, the selling company would not be able to protect its communications with its subsidiary once the transaction has gone through (*NEP Canada ULC v MEC OP LLC*, ABQB, 2013).

1) In-House Disclosure

Otherwise-privileged communications do not lose their confidentiality within a corporation merely by being shared with or between non-management employees. However, wider dissemination greatly increases the risk that persons will disclose the information or that it will otherwise be seen to have lost its confidential character. Further, the corporation should ensure that the persons receiving the information have an interest in obtaining it. If the distribution is to persons who have no apparent need to know, a court is more likely to find that the necessary confidentiality was not maintained and that the privilege has been waived.

Legal advice and other privileged information contained in the minutes from a meeting of the board of directors are subject to privilege (*CKUA Radio Foundation v Hinchliffe*, ABQB, 1999). The portion that contains the privileged communication should usually be explicitly deleted from the producible document.

However, privilege does not protect evidence on collateral matters, such as the process whereby the advice was given, or the client's actions as a result of the advice. Further, where minutes record an action taken upon legal advice, that is a fact rather than advice and is likely not privileged.

2) Disclosure to Third Parties

In general, as soon as a third party knows the information it ceases to be privileged, as the sharing of information is seen as indicating that the client has given up the privilege.

There can be exceptions however. Parties with a common legal interest in the advice, even when not the lawyer's actual client, may be present when the advice is given provided they respect the confidentiality of the advice. It is also generally thought that sharing privileged information with an affiliated corporation is permissible without losing privilege provided the corporation shares common interests with respect to the privileged information, or the in-house counsel involved has both affiliated corporations as clients. However, some commentators, referring to US law, have questioned whether this "interest" exception applies unless both parties are represented by separate lawyers and the communication of the otherwise-privileged information is in order to coordinate their legal activities.

As this is a developing area of the law in Canada, in a particularly sensitive case, it may be prudent to conduct such communications between interested third parties, or affiliated corporations, through their respective counsel, be they in-house or external. Further, privilege may be lost in the event of a conflict between the interested third parties or affiliated corporations, as the information would no longer be confidential as between the client and the outside party. In such a case, one corporation could use the information against the other (*Boreta v Primrose Drilling Ventures Ltd*, ABQB, 2010).

3) Partial Disclosure

There is a concept of limited waiver which has been applied to protect disclosure to a corporation's auditors. The waiver extended only to the auditors (*Philip Services v OSC*, Ont SCJ, 2005).

It sometimes happens that for tactical reasons a party chooses to disclose to an opposing litigant a portion of a privileged communication. However, disclosure of part may result in loss of privilege over the whole document, despite what the disclosing party intended. If the court finds that the other party may have been misled by partial disclosure, privilege over the whole document will likely be lost.

E. Precautions to Maintain Privilege

Not all information has the potential to attract privilege, but it is best to claim privilege wherever possible. We suggest the following steps be taken to best protect privilege. The steps do not ensure that privilege will be maintained, but they will improve the chances that privilege will be respected.

1. Identify privilege issues early on.
    a. Legal advice privilege requires legal advice, whereas litigation privilege is determined by the dominant purpose of the document at the time of its creation.
2. Apply self-serving labels judiciously.
    a. Labeling documents "privileged and confidential" and memorializing the intent to conduct an investigation or undertake other activities in preparation for litigation will assist, though not guarantee, a successful claim of privilege.
    b. The label will also serve as a reminder to others to take care how the documents are later used or disseminated.
3. Ensure where possible that communications flow through a lawyer.
    a. This is essential for legal advice privilege and assists in the ability to assert litigation privilege.
4. Manage the dissemination of documents in respect of which privilege may be asserted, both to ensure that the necessary element of confidentiality is not lost and to avoid inadvertent disclosure, which could be damaging.
5. If investigations are needed, have counsel order them.
    a. Undertake investigations only under the direction of counsel, preferably external litigation counsel.
    b. Make it clear in any documentation establishing or explaining the investigation that its purpose is to produce a report for counsel's use in providing legal advice and for use in anticipated litigation.
        i. If there is a company policy mandating investigations, that policy should reference the dominant litigation purpose.
    c. Have counsel retain any experts that are engaged for the investigation.
    d. Have counsel brief any investigators and those with access to the investigation materials with respect to legal privilege and its preservation.
    e. Have counsel instruct the investigators that the report and all associated information and documentation are to remain confidential for the use of counsel and are not to be released to anyone outside of the legal team or investigative team.
        i. In particular, care should be taken with email. Litigators frequently encounter challenges in maintaining privilege when email is carelessly copied or forwarded to third parties, jeopardizing its confidential status and thereby its privilege.
    f. When investigation reports are to be discussed in-house, have counsel present them for comment.
    g. Discourage internal discussions about matters under investigation except in the presence of counsel.
6. Where any lawyer engages in non-legal functions, whether in-house counsel or in private practice, steps should be taken to segregate those files or otherwise to differentiate that which is undertaken in a legal capacity from that done in other capacities.

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