SOLICTOR & CLIENT PRIVILEGE
A brief perspective from in-house counsel

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INTRODUCTION

Solicitor-client privilege dates back to the 16th Century. It was out of a professional sense of honour on the part of lawyers that another lawyer was not compellable as a witness for the purpose of testifying as to the discussion with ones client. It evolved further into a rule of evidence and continued to evolve to the point that it is a substantive right.[1] Now it is trite to say solicitor-client privilege is essential to the client and the obtaining of legal advice. Clients need lawyers to give them legal advice. Lawyers need complete disclosure from their clients to be able to represent them properly. Complete and candid disclosure from a client will only occur if there is no fear that the disclosed information could be used against them. In *Hodgkinson* v. *Simms* the British Columbia Court of Appeal succinctly stated the reason for privilege:

In my view, the purpose of privilege is to ensure that a solicitor may, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information or material he gathers from his client and others for this purpose, and what advice he gives, will not be disclosed to anyone except with the consent of his client.

Thus it appears to me that, while this privilege is usually subdivided for the purpose of explanation into two species, namely: (a) confidential communications with a client; and (b) the contents of the solicitor's brief, it is really one all-embracing privilege that permits the client to speak in confidence to the solicitor, for the solicitor to undertake such inquiries and to collect such material as he may require properly to advise the client, and for the solicitor to furnish legal services, all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

It is obvious, however, that everything a client says to a solicitor and everything a solicitor does or collects cannot be privileged and it is important to define, with as much precision as possible, what falls within and what falls outside that privilege. [2]

In the last decade there has been a move to greater access to information. Solicitor-client privilege potentially takes away evidence from the court. We as the protectors of privilege need to better appreciate the issues faced by the courts and generally the issues surrounding confidentiality of information. We must also remember that privilege belongs to the client, it does not belong to legal counsel. We are the stewards of privilege on behalf of our clients.

This privilege is not absolute. The courts have protected it for the purposes of general policy but have been reluctant to expand privilege to other professions or relationships. See *R* v. *Gruenke*[3] where the court refused to create a "blanket" privilege for religious confidences but limited it to a case-by-case basis. Chief Justice Lamer categorized solicitor-client as one of the few blanket privileges. Having said that, solicitor-client

[1] *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745.
[2] (1988), 55 D.L.R. (4th) 577 at 583 (B.C.C.A.).
[3] [1991] 3 S.C.R. 263.

privilege can be challenged. A party may challenge the presumption of privilege if it can show why the communications are not to be protected. Lawyers and especially their clients have to be careful that they do not fall into the trap that all their communications are deemed privileged. This is true if the communications are not for the purposes of legal advice or are not of a confidential nature.

Solicitor-client privilege has been defined in the following circumstances:

1. Where legal advice of any kind is sought
2. From a professional legal adviser in their capacity
3. Communications relating to that purpose
4. Are made in confidence
5. By the client
6. Are at their instance permanently protected
7. From disclosure by them or their legal advisor
8. Except if waived. [4]

Although client communications and privilege may overlap in many, if not most instances, the ethical obligation of confidentiality may be wider than that of privilege.[5] Also we must be mindful that there is support for the position that even the name of the client[6] or the fee arrangement may not be privileged.[7] There is conflicting case law. See *Descôteaux* v. *Miezwinski.*[8]

APPLICATION TO IN-HOUSE COUNSEL

As in-house counsel the application of the principle is also of key importance. In-house counsel enjoys the same professional privileges (and duties) as a lawyer in private practice. Lord Denning M.R. states in *Crompton (Alfred) Amusement Machines Ltd.* v. *Commissioners of Customs and Excise (No.2)*:

The law relating to discovery was developed by the Chancery courts in the first half of the 19th Century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisors, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor or his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants and agents of the employer. For that reason the judge thought that

[4] Wigmore, *Treatise on Evidence* (3rd. Ed., 1940), vol.8, para. 2292.
[5] *R.* v. *Tysowski*, [1997] 8 W.W.R. 493 at 499 (Q.B.).
[6] *R.* v. *Buchwald Asper Gallagher Henteleff*, (1995), 101 Man. R (2d) 11 at 14 (Q.B.).
[7] *Burr* v. *Bhat* (1997), 117 Man. R. (2d) 279 at 282 (Q.B.).
[8] [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590.

they were in a different position from other legal advisers who are in private practice. I do not think this is correct. 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 of 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…[9]

In a Canadian case Justice Binnie in *R* v. *Shirose*[10] made a number of important observations that are relevant and are paraphrased below[11]:

1. The fact that counsel is a salaried employee does not prevent the formation of a solicitor-client relationship
2. This extends to communications with corporate employees
3. The attachment of privilege depends on the nature of the relationship, the subject matter of advice and the circumstances in which legal advice is sought and rendered. Privilege does NOT extend to purely business matters even if obtained from legal counsel.

Justice Binnie recently confirmed this principle that privilege extends to in-house counsel but also goes on to note some of the challenges for in-house counsel in *R.* v. *Campbell.*[12] He refers to ***special problems*** arising out of the corporate context. In my opinion these problems arise in three (but possibly more) areas: One has already been noted and that is in-house counsel may be involved in matters that are NOT legal. That is, they have managerial, operational or other duties that may or may not be enumerated in their job description in addition to legal duties.

The other two arise due to the organization structure which in-house counsel serve. The organizational structure, operating methods, the usually high level at which counsel is positioned in the organization, ease of access to that person(s) and lack of understanding as to privilege and other principles governing counsel all of which may lead to a false sense as to who and what are protected by privilege. The "who" is the third area of concern or issue. Who is the client? Corporations and indeed government and other organizations are complex structures and there are numerous parties involved ranging from those who regularly consult with counsel to those who intermittently do so.

Generally, people come to counsel in three main ways: By hierarchy, by the nature of the problem to be solved (i.e. it needs legal help) or by policy, or a combination thereof. It is the role of in-house counsel to solve problems and they generally go where assigned or required. The lack of "formality" is a potential contributor to narrowing down who is the client to be protected by privilege and as already mentioned the blanket feeling that everyone and everything is privileged because it was discussed with counsel.

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[9] [1972] 2 All E.R. 353 at 376 (C.A.).
[10] (1999), 133 C.C.C. (3d) 257 at 288-191 (S.C.C.)
[11] See also *Gendis Inc.* v. *Richardson Oil & Gas Ltd.* (1999), 140 Man. R. (2d) 290 (Q.B.)
[12] [1999] 1 S.C.R. 565 at 602.

It is important to remember that the role the lawyer is playing is critical to privilege. Being a lawyer is not enough to invoke privilege.[13] The role the lawyer is playing, the nature and how communications are made and the subject matter are key determinants as to the applicability of privilege. Applicability of privilege will be evaluated on a case-by-case basis.

Justice Saunders in *Mutual Life Insurance Co. of Canada* v. *Deputy Attorney General of Canada* stated that:

The communications are privileged if they concern the employee's function as a lawyer and are not privileged if the lawyer is performing a business or other function. [14]

Later he discussed the kinds of communications that would generally be considered privileged:

(a) Communications from client to lawyer, directly and indirectly,
- *(i) Requesting advice, commenting thereon and providing information with respect thereto;*
- *(ii) Instructing on legal matters;*
- *(iii) Providing information and commenting on actual or contemplated litigation.*

(b) Communications from lawyer to client, including advice and opinion; request for instruction; submissions of draft documents for instruction and comment; follow-up and general supervision on confidential legal matters. In this category there is included communications between employees advising on the above communications.

(c) Communications between lawyers for the client, for the purpose of formulation legal advice with copies to various employees.

(d) Working papers found in lawyers' files, including copies of non-privileged documents with lawyers' notes thereon, and lawyers' notes of discussion with client and others relating to advice given to client or actual or contemplated litigation. [15]

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[13] See *Ontario Securities Commission* and *Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Ont. Divisional Court) at 340. Here a party gave legal advice from time to time but being a lawyer was not enough to invoke privilege. See also, *Toronto Dominion Bank* v. *Leigh Instruments Ltd.* (1997), 32 O.R. (3d) 575 (Ont. Gen. Div.) where the documents were ordered to be produced and are a good example of how documents by the legal department should be handled. There were identified issues as to internal process and the lack of confidentiality that ultimately proved fatal to meeting the tests for privilege.

[14] (1988), 28 C.P.C. (2d) 101 at 104 (Ont. H.C.)

[15] *ibid.* at 105.

APPLICATION TO GOVERNMENT LAWYERS

It appears that there is almost no distinction with respect to this principle as it applies to corporate counsel and government legal counsel. But like in-house corporate counsel, the communications to be impressed with privilege have to follow the same rules. It was stated by Justice Binnie that:

While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. [16]

That being the case government lawyers may want to be conscious of how government operations, policy, etc. may affect privilege. In *Stevens* v. *Canada (Privy Council)*, Linden, J.A. stated:

I would add, with respect to the release of portions of the records, that, in light of these reasons, the Government has released more information that was legally necessary. The itemized disbursements and general statements of account detailing the amount of time spent by the Commission counsel and the amounts charged for that time are all privileged. But it is the Government qua client which enjoys the privilege; the Government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the Government was merely exercising its discretion in that regard. As I mentioned earlier, a Government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients. [17]

As noted, there is no distinction with respect to the application of privilege between outside counsel, in-house counsel (corporate or government) and as to government lawyers themselves there does not appear to be a great deal of statutory support but I do refer you to the Nova Scotia privacy legislation and in particular sections 13, 14, and 16 of the *Freedom of Information and Protection of Privacy Act*[18] which, specifically gives the right to not reveal certain types of information such as draft legislation but in section 16 reiterates that information subject to solicitor-client privilege is protected from disclosure.

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[16] *R.* v. *Shirose, supra* note 10 at 288-289.
[17] (1998), 161 D.L.R.. (4th) 85 at 109.
[18] S.N.S. 1993, c.5, s.1.

Similarly, it appears that the communication of a legal opinion or other document that is protected by privilege within the government will not be a waiver of privilege. That is, the courts appear to view this as distributions internally within the organization of the client and it does appear to matter the client is the government. Justice Mackay in *Halifax Shipyard Ltd.* v. *Canada (Minister of Public Works and Government Services)* stated:

…the Executive Branch of the Government of Canada is the client, indivisible, and legal advice provided to one branch of the executive subject to solicitor-client privilege continues to be subject to that privilege, though the document containing the advice be made available to another branch of the executive. [19]

It is clear privilege exists and is available to in-house counsel but what is important is how can the case law (and common sense) be applied to assist counsel in creating and preserving privilege? The following section is a synthesis of the aforementioned information and case law that may be applied by counsel. Every organization is different and every case is different. This is not a complete list but may prove to be a useful reference.[20]

PRACTICAL ADVICE FOR CREATING AND PRESERVING PRIVILEGE

1. <u>The role of in-house counsel:</u> Be clear that you are acting as legal counsel and not in another capacity such as it relates to operations, investigations, etc.

    a. Upon receipt of an assignment or notice of a matter attempt to clarify your role. Communicate it directly with personnel involved to limit any misunderstandings concerning the applicability of privilege.

    b. Where practicable note this on documents.

    c. Different letterhead or such other methods may be useful. Separate operational filing and information from legal filing.

    d. Use outside counsel if you have specific concerns about the ability to separate roles.

2. <u>Corporate Policies:</u> Develop organizational systems that attempt to ensure that communications to counsel are in writing and for the purpose of requesting legal advice with respect to a specific issue.

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[19] (1996), 113 F.T.R. 222 at 225.

[20] The foundation for this paper and the excellent checklist have been shamelessly borrowed from the excellent CLE materials "*Solicitor-Client Privilege: Issues for Private, In-House and Public Sector Lawyers*", The Law Society of Manitoba, Legal Studies Department, October 11, 2000. The authors produced a great body of work and deserve all the credit and have my very grateful thanks.

a. Develop a referral process for legal counsel so requests are initiated by that person to counsel and in writing requesting legal advice.

b. If a person is legally trained but has only operational functions they should try to implement a system where they avoid the giving of legal advice even intermittently and ensure opinions are obtained from legal counsel.

c. Communicate regularly the importance of clearly marking files as confidential, privileged, etc. and that such files should be separated from regular operational files.

d. Try and develop organizational policies and procedures that make the legal department the body that has responsibility over matters which may have legal implications.

3. Communications:

a. Where appropriate, counsel should reply to communications noting the legal advice requested, what information is required by counsel and the steps likely to follow regarding the providing of legal advice and outlining the steps to be followed for the purposes of privilege.

b. Mark documents with the appropriate notations such as “privileged”, “confidential” or “prepared at the request of legal counsel for the purpose of providing legal advice”.

c. Ensure communications demonstrate the use and application of legal skill and advice.

d. When communicating ensure that communications expressly state that the purpose of the communication is for legal advice and when requesting information from others especially employees be sure to state that the information is requested for the purposes of rendering legal advice.

4. Office Procedures:

a. Separate legal files from other files especially those of a management, operational or non-legal nature.

b. In legal files try to include only those documents that have relevance to the legal issue and are supportive that counsel has exercised legal knowledge and skill.

5. Protection to avoid WAIVER of privilege:

a. Keep all documents confidential that are received from counsel or sent to counsel whether external or internal. Restrict their circulation.

b. Limit communications with third parties. Pay special attention to those who may not be reasonably characterized as employee or agent of legal counsel or the organization.

c. Use non-disclosure agreements with third parties and agents and include a non-waiver of privilege clause.

d. Be familiar with regulatory filings that permit filing on a confidential basis. Where possible assert confidentiality or privilege clearly and as early as practicable.

e. With respect to litigation or potential litigation:

    1. Exercise great caution before using organizational knowledge or understanding of the law ("state of mind") into pleadings. This may create an implied waiver.

    2. Ensure witnesses understand the implications of referring to a privileged document in their testimony at discovery, hearings, court, etc.

f. In search and seizure circumstances assert privilege at the very outset and require the items to be sealed pending a determination of the claim of privilege.

6. <u>Protecting the denial of privilege on the grounds that communications were not confidential:</u>

    a. Keep communications and documents that you feel you may need to impress with privilege restricted:

        1. Locked or deposited in an area where access is restricted.

        2. Limit the number of persons to only those who truly need access.

        3. On the documents or elsewhere note that the material is not to be copied, circulated or disclosed.

    b. Protect the organization from unauthorized or inadvertent communication of documents to third parties especially as it relates to technology such as email transmissions. Consider password protection, secure transmissions systems, encryption, verification of recipient address information, use of audit trails, etc.

7. Protecting the denial of privilege on the grounds that communications were not made "*for the dominant purpose of preparing for existing or expected litigation*":

    a. If information gathering including interviews is completed for the purpose of preparing for litigation then have the purpose stated on the face of the documents. Use a number of means to indicate same not just a rubber stamp.

    b. All information should be separated by specific matters and labeled as noted above in a.

    c. Investigation methodology including reporting completed for litigation should differ from how the organization completes other internal reports.

    d. Avoid including in investigative reports to be used for possible litigation information that may have been obtained otherwise for other organizational purposes.

    e. Consider the use of outside legal counsel for investigations, as privilege seems to be less vigorously attacked due to the deemed presumption that they are truly acting in a professional capacity.

8. Other: If you have concerns with respect to the division of legal duties and other organizational functions and the above recommendations including the use of outside counsel have not been followed, are impractical, etc. then advise the appropriate personnel of the possibility that privilege may not be effective and ensure that those persons are not under any assumption that communications with you are protected.