THINGS YOU DIDN'T KNOW YOU DIDN'T KNOW

ABOUT LEGAL PRIVILEGE

By David Wotherspoon and Alim Khamis*

There are many terms of art and arcane concepts in the legal profession; lawyers toss them around as part of daily professional life. Some of those terms and concepts are not fully known despite their frequent use. This article on privilege is the first of four within the theme "Things You Didn't Know You Didn't Know". Some readers, many perhaps, will know that privilege comes from the Latin word *privilegium*, meaning a law just for one person, or that time being of the essence has nothing to do with doing things quickly. But we hope that in reading the "Things You Didn't Know You Didn't Know" series, you will learn something new while refreshing your knowledge on a few terms of art and arcane concepts.

BACKGROUND

The *Cambridge English Dictionary* defines "privilege" as (1) "an advantage that only one person or group of people has, usually because of their position"; (2) "an opportunity to do something special or enjoyable"; or (3) "the special right that some people in authority have that allows them to do or say things that other people are not allowed to".[1] It is no surprise that the term "privilege" is often associated with some form of socioeconomic privilege.

Nevertheless, "privilege" is used in a variety of contexts. People refer to parliamentary privilege, clergy-penitent privilege, medical professional privilege, reporter privilege, absolute and qualified privilege and socioeconomic privilege. This article is concerned with categories of legal privilege—the right not to disclose protected communications in a legal context.

IS LEGAL PRIVILEGE ONLY FOR THE PRIVILEGED?

The common use of "privilege" is not the same as legal privilege. Legal priv-

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ilege identifies and classifies relationships and communications that are presumptively protected from disclosure, including communications between a lawyer and client, communications and documents prepared for the dominant purpose of litigation and communications between parties exploring settlement.[2] While the derivation of these terms may be common, their use is not. Certainly, however, one need not be wealthy to enjoy legal privilege.

SOLICITOR-CLIENT PRIVILEGE

The most common form of legal privilege is solicitor-client privilege. It originates from English law during the reign of Elizabeth I. Historically, solicitor-client privilege was thought to be based in the honour and professionalism of lawyers and subsequently focused on the importance of clients being able to speak freely to their lawyers.[3] The original doctrine of privilege focused on a lawyer's duty to refrain from testifying about their communications with their clients, but over time the doctrine took on a broader scope, covering all communications (including documentary communications) between a lawyer and client intended to be confidential.[4]

In Canada, solicitor-client privilege was recognized in the early 20th century. The Supreme Court of Canada adopted John Henry Wigmore's definition of privilege, in *Howley v. The King*.[5] This remains dominant in Canada today and is paraphrased below:[6]

> the client must be seeking legal advice from a legal professional acting in that capacity. These communications, relating to a legal issue, are made confidentially and are protected from disclosure. The exception is if the privilege is waived.[7]

Solicitor-client privilege never ends unless terminated by the client.[8] In other words, solicitor-client privilege continues beyond the lifetime of any litigation or transaction or the particular issue on which legal advice was sought.

Solicitor-client privilege moved beyond a rule of evidence over the past few decades and has been interpreted such that it may be protected under ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. In *Solosky v. The Queen*,[9] the Supreme Court of Canada described privilege as a fundamental right. In contrast with the word's Latin roots denoting a law just for one person, any Canadian can claim this privilege over confidential communications with their lawyer under the right circumstances.

While zealously protected, solicitor-client privilege can be waived, most commonly in two circumstances. The first is when the client puts the communication at issue in a legal proceeding.[10] This can apply to other forms of privilege, discussed below. Privilege can also be waived when communica-

tions are disclosed to a third party not integral to the solicitor-client relationship.[11]

There are exceptions to the client's right against disclosure:

- If a lawyer believes non-disclosure would compromise public safety, safety prevails.[12]
- If an accused's innocence is at stake, a successful *McClure* application sets privilege aside.[13]
- Illegal communications or those made for the purpose of committing criminal activity are not protected by privilege.[14]
- Solicitor-client privilege may not apply in wills and estates cases when the court needs to determine the capacity or intent of a testator.[15]
- Legislation creates some narrow exceptions. For instance, British Columbia's *Legal Profession Act* dictates that a lawyer, if required under the Act to provide information to the Law Society, must do so despite privilege. This would be in the context of an audit or investigation.[16]

Solicitor-client privilege does not apply simply because a lawyer is included in communications; the communication must be made for the purpose of giving or receiving legal advice. Therefore, it applies to some, but not all, in-house counsel communications with internal clients. Many in-house counsel hold different, concurrent roles within an organization (e.g., senior management positions). Solicitor-client privilege does not apply to business or policy advice that lawyers may give while performing non-legal functions within a business.

Best Practice

First, it is prudent to clearly mark documents "Confidential – Subject to Solicitor-Client Privilege" to clarify that documents are intended to be protected from use beyond the legal advice being provided. It may also be prudent to label them "Do Not Copy or Transmit" or otherwise identify restrictions as may be appropriate in the circumstances.

Second, for in-house lawyers, consider separating legal and policy/business advice into separate documents and files in order to clearly distinguish between privileged and non-privileged communications. This may be inconvenient in practice, but may save sensitive documents from later unwanted disclosure.

Third, limit the circulation of legal advice by distributing it on a need-to-know basis and on the informed understanding that it is privileged.

LITIGATION PRIVILEGE

Litigation privilege applies to communications created for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. In many ways, it is like solicitor-client privilege, but it differs in material ways.

Litigation privilege requires that (1) the documents or communications have been prepared, gathered or annotated by counsel or individuals under counsel's direction; (2) the preparation, gathering or annotating is done in the context of litigation; and (3) if there are multiple purposes for the documents or communications, the documents must have been created for the *dominant purpose* of litigation (or a reasonable prospect of litigation).[17]

Unlike solicitor-client privilege, litigation privilege ends when the litigation ends, absent related proceedings that would continue the privilege.

While they often overlap, litigation privilege can be established while solicitor-client privilege is not. This may be the case if the communications are not in the context of a solicitor-client relationship, but still for the dominant purpose of litigation: collections of documents for cross-examination, for example.[18] It may also be because litigation privilege does not carry a key requirement that solicitor-client privilege does—namely, confidentiality.[19] In other cases, both privileges are claimed concurrently,[20] or in the alternative.[21]

Best Practice

The dominant purpose test is essential in internal investigations. Here, litigation privilege can apply regardless of whether the investigator is a lawyer, as long as the dominant purpose of that investigation is litigation.[22] Consider retaining external counsel to direct or conduct any such investigation, and confirm their opinion that litigation is a reasonable prospect through documentation.[23]

Litigation privilege will not apply if litigation is not a reasonable prospect for the parties at the time of the communication, or if there is no evidence that litigation is being contemplated.[24] Litigation is a reasonable prospect when a reasonable person, aware of all circumstances, would conclude that it is unlikely a claim will be resolved without litigation.[25] It is also prudent to clearly mark documents as "Privileged – prepared for the purpose of litigation" or "Privileged – prepared in anticipation of litigation".

Can Litigation Privilege Be Waived?

Litigation privilege may be waived when (1) litigation documents are disclosed to an outside party for purposes other than the litigation; (2) the communication between counsel and a client or related third parties is

connected to a separate communication, where selective disclosure could mislead the other party; or (3) if fairness and consistency require disclosure on account of other disclosures made by the party.[26]

SETTLEMENT PRIVILEGE

Settlement privilege protects settlement agreements and communications in an attempt at settlement. Its purpose is to encourage full and frank discussion between parties, whether that takes place in informal negotiations or mediation, without the fear that any admissions made or concessions given will later be held against them. This would typically include offers of settlement, and may include admissions of fact, which have been recognized by courts as attempts to compromise during settlement negotiations: "[if] the compromise fails the admission of the facts made for the purpose of the compromise should not be held against the maker of the admission and should therefore not be received in evidence".[27] This way, if negotiations fail, the communications made for the purpose of settlement will not be used against their maker.[28]

Settlement privilege applies in circumstances where (1) a litigious dispute exists or is otherwise contemplated; (2) parties negotiate in an attempt to settle the dispute; and (3) it is expressed or implied that the negotiations will not be divulged to the court in the event that negotiations fail.

Best Practice

While it is common to include one, do not rely on a "without prejudice" label—your correspondence (or correspondence that you have received from others) may not be privileged even if it bears that label. Further, the phrase's absence does not prevent the relevant communication from being covered by settlement privilege.

Consider whether correspondence meets the three-part test for settlement privilege described above. If it does, the communication is likely to be privileged. If it does not, it is unlikely to be protected regardless of label.[29]

COMMON INTEREST PRIVILEGE

Common interest privilege applies where two or more parties have a common interest in litigation or the prospect of litigation. This often arises in respect of co-defendants. For instance, it may be raised where co-defendants intend to advance a common defence or cooperate regarding witnesses or documents. For common interest to apply, an underlying privilege (usually solicitor-client or litigation privilege) must first be established.

Best Practice

Parties regularly enter into a common defence or common interest privilege agreement to minimize the likelihood of disputes about the application of common interest privilege.

Can Common Interest Privilege be Waived?

Some cases suggest that common interest privilege, rather than being a privilege in itself, is an exception to waiver.[30] Common interest privilege applies in a scenario where a lawyer confidentially discloses an opinion to another party with "sufficient common interest in the same transactions", in which case waiver does not apply.[31]

That said, common interest privilege can be waived if a party who possesses it does so clearly and unequivocally with knowledge that the waiver is final.[32] Before determining whether common interest privilege has been waived, it is important to first establish that an underlying privilege actually applies to the record in question.[33]

REPUTATION MANAGEMENT PRIVILEGE – AN EMERGING TREND?

There are circumstances where legal disputes overlap with reputation issues. For example, in a defamation claim, hiring a public relations ("PR") specialist may benefit the client who alleges they were defamed. Where legal and PR advice intersect, can PR advice be protected by privilege?

In the United States, Martha Stewart's lawyers hired a PR firm so that media coverage would not encourage prosecutors to charge her during criminal investigations. The firm specialized in "litigation public relations", and its involvement would make the case controversial in an unexpected way: Could the prosecutors access communications among Stewart, her lawyers and the PR firm? The court made a groundbreaking decision: most of these communications were, in fact, protected by privilege.[34]

Stewart's lawyers successfully argued that the target of the PR advice was not the public, but the prosecutors and regulators she was facing. The advice was for the purpose of creating a media environment that would not unduly prejudice her case.

Canada has had no such case, but will the law here follow the same trajectory? The starting point, of course, is that solicitor-client privilege protects legal advice between a lawyer and client. However, if giving reputational advice is integral to the lawyer-client relationship, mitigation of harm being a central concern, that would arguably make the PR firm an agent of the lawyer and extend the privilege. This may be contingent on whether the reputational manager is performing a role that the client can-

not reasonably perform. This, along with the need for the reputational manager's advice to be essential to seeking legal advice, limits the type of PR advice that would be covered by privilege.[35] The advice sought cannot be more concerned with a party's PR or reputational management strategy than with obtaining legal advice.[36] The media strategy must be a component of the legal advice itself.[37]

Litigation privilege may more effectively protect reputation management advice than solicitor-client privilege because its objectives are different. Litigation privilege exists to ensure the efficacy of the adversarial process and prevent premature disclosure.[38] If the reputation management advice is necessarily connected to the litigation in question, it may well be protected.[39]

It is also possible that reputational management advice can be established as a class privilege under the Wigmore criteria if the advice meets the following requirements:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.
3. The relation must be one which, in the opinion of the community, ought to be sedulously fostered.
4. The injury that would inure to the relation by disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation.[40]

While this criteria can plausibly be met in some cases, the courts will be reluctant to establish a class privilege if the court contemplates that privilege resulting in "occasional [injustices]" in the future.[41] However, the law should be extended to cover reputation management in appropriate circumstances. Perhaps Canada will have its own Martha Stewart case that will inform the landscape of privilege.

ENDNOTES

1. *The Cambridge English Dictionary*, *sub verbo* "privilege", online: <dictionary.cambridge.org/dictionary/english/privilege>.
2. *R v Nguyen*, 2015 ONCA 278 at para 16.
3. Robert A Kastling, "Recent Developments in the Canadian Law of Solicitor-Client Privilege" (1978) 24:1 McGill LJ 115 at 115–16.
4. *Ibid* at 116–17.
5. [1927] SCR 519.
6. See Adam M Dodek, "Reconceiving Solicitor-Client Privilege" (2010) 35:2 Queen's LJ 493 at 498.
7. *Ibid*.
8. *Blank v Canada*, 2006 SCC 39 [*Blank*]. See also *R v Gruenke*, [1991] 3 SCR 263.
9. (1979), [1980] 1 SCR 821.
10. See *R v Shirose and Campbell*, [1999] 1 SCR 465. This is a predominant theme in recent case law on privilege: see e.g. *Matthews, Dinsdale & Clark LLP v 1772887 Ontario Limited*, 2021 ONSC 2563; *R v Smithen-Davis*, 2021 ONCA 731; *R v Bartel*, 2021 ABPC 201; *Rumacik v Hardy*, 2021 ABQB 374; *Ohlhauser v Kasian*, 2021 BCSC 892; *R v NNH*,

2021 BCPC 127; *Boucher v R, 2021* CanLII 27332 (NBCA).

11. *Imperial Tobacco Canada Ltd v The Queen*, 2013 TCC 144.
12. *Smith v Jones*, [1999] 1 SCR 455 at para 77.
13. *R v McClure*, 2001 SCC 14.
14. See *R v Campbell*, [1999] 1 SCR 565.
15. *Goodman Estate v Geffen*, [1991] 2 SCR 353.
16. *Legal Profession Act*, SBC 1998, c 9, s 88.
17. *Raj v Khosravi*, 2015 BCCA 49 at para 7 [*Raj*].
18. *Leclerc et Banque Laurentienne du Canada, Re*, 2018 CIRB 869.
19. *Lamey (Litigation Guardian of) v Rice*, 2000 CanLII 30189 at paras 9–10 (NBCA).
20. *Huang v Silvercorp Metals Inc*, 2017 BCSC 795; *Gale v Halton Condominium Corporation No 61*, 2020 ONSC 5896; *R v Hartman*, 2017 ONCJ 968.
21. *Apotex Fermentation Inc v Novopharm Ltd*, 1994 CanLII 16680 (MBCA); *R v Codina #7*, 2018 ONSC 1096.
22. Practical Law Canada (Employment), "Practice Note: Conducting an Internal Workplace Investigation" (2018), online: <ca.practicallaw.thomsonreuters.com/w-010-1347?transitionType=Default&contextData=(sc.Default)&firstPage=true>.
23. *Ibid*.
24. *McCarthy v City of North Vancouver*, 2021 BCSC 2517 [*McCarthy*]; *Salvation Army v Dhaliwal*, 2022 ONSC 1447.
25. See *McCarthy*, *supra* note 24.
26. *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, [1983] 4 WWR 762 (BCSC).
27. *Middlekamp v Fraser Valley Real Estate Board*, 1992 CarswellBC 26 (CA); *Hoghton v Hoghton* (1852), 15 Beav 278; *Scott Paper Co v Drayton Paper Works Ltd* (1927), 44 RPC 151.
28. *R v Delchev*, 2015 ONCA 381.
29. *Re Bella Senior Care Residences*, 2019 ONSC 3259; *Leonardis v Leonardis*, 2003 ABQB 577.
30. *Pitney Bowes of Canada Ltd v R*, 2003 FCT 214 at para 14.
31. *Igillis Holdings Inc v Canada (Minister of National Revenue)*, 2018 FCA 51, leave to appeal ref'd 2018 CanLII 99657 (SCC).
32. *Canmore Mountain Villas Inc v Alberta*, 2009 ABQB 348.
33. *Power v RGMP*, 2021 ABQB 877.
34. *Re Grand Jury Subpoenas*, 265 F Supp 2d 321 (SDNY 2003).
35. *Canadian Pacific Ltd v Canada (Director of Investigation & Research)*, 1995 CarswellOnt 695 at para 22 (Gen Div); *Hoy v Medtronic Inc*, 2001 BCSC 944 at paras 42–43.
36. *Andersen v St Jude Medical Inc*, 2007 CarswellOnt 9590 at para 21 (SCJ).
37. *Ibid* at para 28.
38. *Blank*, *supra* note 8 at para 27; *Raj*, *supra* note 17 at para 7.
39. *Kaymar Rehabilitation Inc v Champlain Community Care Access Centre*, 2013 ONSC 1754 at para 59.
40. *Slavutych v Baker*, [1976] 1 SCR 254 at 260.
41. *M(A) v Ryan*, [1997] 1 SCR 157 at para 32.