The Law of Privilege in Canada

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Types of privilege

- Main types of privilege:
  - Solicitor-client
  - Litigation
  - Settlement

- There is also common interest “privilege”, which is more of an extension of other privileges than a separate privilege.
Solicitor-client privilege

- Three pre-conditions to solicitor-client privilege:
  - a communication between lawyer and client;
  - which entails the seeking or giving of legal advice; and
  - which is intended to be confidential by the parties.

_Solosky v. The Queen_, [1980] 1 S.C.R. 821
Solicitor-client privilege

• The privilege extends also to materials “directly related to the seeking, formulating or giving of legal advice or legal assistance” (e.g., working papers).

In-house counsel and the solicitor-client relationship

• Legal advice, not business advice, is covered:
  • The lawyer must be “providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity”.
  • It “does not matter” whether litigation is contemplated.

*Canada v. Blood Tribe Department of Health, 2008 SCC 44*
In-house counsel and the solicitor-client relationship

• Legal advice from in-house counsel qualifies:
  • “Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose”.
  • However, “[i]f an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is ‘in-house’ does not remove the privilege, or change its nature”.

  *Pritchard v. Ontario, [2004] 1 S.C.R. 809*
Solicitor-client privilege in Canada

• This privilege is strongly guarded:
  • Solicitor-client privilege is “a principle of fundamental justice and civil right of supreme importance in Canadian law”.
    

  • It “must be as close to absolute as possible to ensure public confidence and retain relevance”.
    
Loss of solicitor-client privilege

• The privilege “belongs to the client” and can only be “waived by the client or through his or her informed consent”.


• So the client’s voluntary disclosure to a third party constitutes waiver; the client’s compelled or unintended disclosure does not.
“Limited” Waiver of Privilege

• When producing privileged information to auditors, securities commissions, etc., you should document your intentions by way of a “limited waiver” letter as part of the terms of the engagement or response.

• Even without a letter, Ont. Div. Court accepted implied limited waiver.


• This may not protect you in the USA.
Loss of solicitor-client privilege

• But loss of the privilege can also “occur in the absence of an intention to waive, where fairness and consistency so require”.


• No privilege attaches to communications that “are criminal or ... made with a view to obtaining legal advice to facilitate the commission of a crime”.

Litigation privilege


- The purpose of the privilege “is to create a ‘zone of privacy’ in relation to pending or apprehended litigation” so that litigants can “prepare their contending positions in private, without adversarial interference and without fear of premature disclosure”.

  *Blank* (paras. 27 and 34)
Litigation privilege

• “While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process”.

  Blank (para. 61)
Litigation privilege

- Overlap with solicitor-client privilege is likely:
  - “The distinction between the solicitor-client privilege and the litigation privilege does not preclude their potential overlap in a litigation context. ... [A]nything in a litigation file that falls within the solicitor-client privilege will remain clearly and forever privileged”.

  Blank (paras. 49-50)
Litigation privilege

“Litigation privilege ... is not ... restricted to ... communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties”.

Blank (para. 27)
Loss of litigation privilege

- Absent pending or reasonably apprehended “closely related proceedings”, litigation privilege ends “upon the termination of the litigation that gave rise to the privilege”.

  *Blank* (para. 36)

- “Closely related proceedings” include:
  - proceedings that “involve the same or related parties and arise from the same or a related cause of action”; and
  - proceedings that “raise issues common to the initial action and share its essential purpose”.

  *Blank* (para. 39)
Loss of litigation privilege

• The privilege is also lost when litigation privileged materials are tendered or relied on in court (e.g., when a party calls an expert witness).

Settlement privilege

• “[D]ocuments or communications created for, or communicated in the course of, settlement negotiations” are settlement privileged.


• The protection is broad, and generally includes even a concluded settlement agreement.

  *B.C. Children's Hospital v. Air Products Canada*, 2003 BCCA 177
Exceptions to settlement privilege

- Settlement privilege cannot be claimed where:
  - there are allegations of fraud; or
  - the documents or communications “may be required to meet a defence of laches, want of notice, passage of a limitation period or other similar matters”.

Common interest privilege

- Common interest privilege is better described as a “common interest exception” to the rule that disclosure of privileged information to a third party waives the privilege.

- The exception applies where privileged information is confidentially shared among parties “sharing a common goal or seeking a common outcome” - i.e., having a common interest.

Common Interest Privilege

• Legal opinions can be shared without loss or waiver of privilege, where sharing “facilitated completion of the transaction because parties were informed of the respective legal positions of others.”

*Pitney Bowes of Canada v. Canada*
Common interest privilege

• When do parties have a sufficient common interest?
  • When they share “a united front against a common foe”.
    
  • When they wish to see the successful completion of a commercial transaction.
    
    *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510
    *Pitney Bowes of Canada Ltd. v. Canada*, 2003 FCT 214
  • When “a fiduciary or like duty has been found to exist between the parties” (*e.g.*, in “certain types of contractual or agency relations”)
    
Common Interest Transactional Privilege

• “The common interest exception originated in the context of parties sharing a common goal or seeking a common outcome...It has since been narrowly expanded to cover those situations in which a fiduciary or like duty has been found to exist between the parties so as to create common interest.”

Common Interest Privilege

- “it is hard to imagine how the requirements of full and true disclosure imposed by securities legislation in Canada could be satisfied if the consequences of such disclosure in merger negotiations are a loss of privilege over highly sensitive and proprietary information. Such an outcome would have a chilling effect on disclosure and would cripple negotiations.”

Loss of common interest privilege

- When does the common interest exception cease to apply?
  - When the parties become “pitted ... in litigation” against each other.


- The mere fact that the commonly interested parties might, at some point in the future, become adverse in interest is irrelevant.

Waiver of common interest privilege

- The exception does not change the rule that only the party that holds the underlying privilege can waive it.

Lessons from *Teleglobe v. BCE - 1*

- BCE funded Teleglobe, but then pulled out
- Teleglobe’s creditors put it into receivership, then sued BCE over the funding
- US subsidiaries of Teleglobe demanded copies of all outside opinions provided to either of BCE or Teleglobe (Teleglobe relied on BCE for in-house legal services)

*Teleglobe USA Inc. v. BCE Inc.*  2006 US Court of Appeal (Third Circuit 06-2915)
Lessons from *Teleglobe v. BCE* - 2

- Does the fact that a parent and subsidiary used the same counsel on a joint retainer entitle other subsidiaries to have access to privileged communications between outside counsel and the parent on a matter that fell outside the joint retainer?

*Teleglobe USA Inc. v. BCE Inc.* 2006 US Court of Appeal
Lessons from *Teleglobe v. BCE* - 3

- Decision:
  While a party to a joint retainer could use the shared privileged communications against the other if they had a falling out, such a party could *not* disclose the communications to a person who was not a party to the joint retainer.

*Teleglobe USA Inc. v. BCE Inc.* 2006 US Court of Appeal
Lessons from *Teleglobe v. BCE* - 4

- In-house counsel urged to avoid joint representations except when necessary and to limit the scale of joint representations.

- Court suggested separate counsel when the interests of the parent and the subsidiary company diverge.

- Avoid use of joint representations in spin offs.

*Teleglobe USA Inc. v. BCE Inc.* 2006 US Court of Appeal