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## 1. DEFINITION – PRESENTATION

Communications, whether written or oral, between a lawyer and client are protected by solicitor-client privilege where those communications are related to the provision of legal advice and whether or not they are related to litigation.

A communication that is (1) between a solicitor and client; (2) which entails the seeking or giving of legal advice; and (3) which is intended to be confidential by the parties will be protected by solicitor-client privilege and, is thus, protected from disclosure.

The privilege is permanent unless waived by the client or where the communication falls within a limited array of exceptions. The privilege is not absolute, but it is as absolute as is possible.

## 2. SOURCES

Solicitor-client privilege, as recognized in Canada, arose in the English Courts of Chancery and was recognized by the common law courts in the 1600s. The common law remains the primary source of solicitor-client privilege.

### 2.1. Relevant statutes

Regard should be had to the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as well as to equivalent provincial *Evidence Acts*.

Also, British Columbia's *Legal Profession Act*, R.S.B.C. 1998, chapter 9, and other provincial equivalents should be considered depending on the context.

### 2.2. Relevant Case Law

The Supreme Court of Canada, in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, in elevating solicitor-client privilege from an evidentiary rule to a substantive right, stated that:

> 1) The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2) Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentiality.

3) When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4) Acts providing otherwise in situations under para. 2 and enabling legislation referred to in para. 3 must be interpreted restrictively.

The Supreme Court of Canada has recently elevated solicitor-client privilege, in the criminal law context, to a constitutional right protected by the *Canadian Charter of Rights and Freedoms*. See *Smith v. Jones*, [1999] 1 S.C.R. 455, *R. v. McClure*, [2001] 1 S.C.R. 445, *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 and *Maranda v. Richer*, [2003] 3 S.C.R. 209.

The Supreme Court of Canada has alluded to the application of the principles of solicitor-client privilege, as developed in criminal cases and under the *Canadian Charter of Rights and Freedoms*, including its constitutionalization, to civil cases (*Maranda*, *supra*).

## 3. SCOPE/LIMITS

Solicitor-client privilege belongs to the client and, as such, can only be waived by the client. However, if the communication falls within limited defined exceptions, the privilege may not apply to protect the communication from disclosure.

Exceptions to solicitor-client privilege include:

a. where the privileged information may prevent an accused from providing a full answer and defence – the innocence at stake exception;

b. where the communication between client and solicitor is criminal or is made in furtherance of the commission of a crime – the fraud and future crimes exception; and

c. where the public's safety is at risk and breach of solicitor-client privilege may serve to prevent harm from occurring – the public safety exception.

There is also the 'common interest exception.' This can arise where two or more persons, each having an interest in some matter, jointly consult a solicitor. Their

confidential communications with the lawyer will be held privileged as against the outside world, however, as between themselves, each party will have access to all communications between the other party and the solicitor. The privilege is inapplicable as between the joints clients.

Waiver of solicitor-client privilege is "ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege." (*S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C.S.C.). For there to be a waiver, there must have been disclosure to a third party.

Waiver of the privilege can only be effected through the client's informed consent. Despite this limitation, Canadian courts have accepted that a party can be taken to have implicitly waived solicitor-client privilege where that party, *inter alia*, brings suit or raises an affirmative defence that makes its intent and knowledge of the law relevant, or places the question of its state of mind in issue.

The Supreme Court of Canada has recognized that "it is not always necessary for the client actually to disclose part of the contents of the advice in order to waive privilege to the relevant communication of which it forms a part" (*R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 70). Cases such as this rely on waiver by implication or waiver by conduct.

Waiver through inadvertence is excluded by the rule requiring informed consent (see *Lavallee*, *supra*, at para. 30). Inadvertent disclosure does not necessarily waive privilege; more is needed.

### 3.1. Between Lawyers

Information exchanged in the course of settlement negotiations and offers to settle are usually privileged and, thus, protected from disclosure. Using the words "without prejudice" often, but not always, indicates that the material contained in the communication is to be subject to the 'settlement privilege'. The words "without prejudice" are neither sufficient nor necessary to establish a claim of privilege. The intent of the communication is important.

Settlement privilege has been held to apply to both 'without prejudice' documents and communications made for, or communicated in the course of settlement negotiations. The privilege extends to the settlement agreement itself (see *Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4$^{th}$) 227 (B.C.C.A.) and *British Columbia Children's Hospital v. Air Products Canada Ltd.* (2003), 224 D.L.R. (4$^{th}$) 23 (B.C.C.A.)).

'Without prejudice' communications containing an offer to settle can be entered into evidence on a costs determination, if the communication is stated explicitly to be made 'without prejudice' subject to the right of the offering party to rely on the document for the purposes of costs.

Outside of a settlement context, the words 'without prejudice' do not usually indicate an expectation that the document will be privileged and, thus, protected from disclosure. Instead it usually indicates that the document can be placed into evidence without limiting the writing party's freedom to assert all its rights unaffected by anything stated in the communication.

### 3.2. Third Parties

Whether communications between the client and a third party or between the solicitor and a third party will be held privileged falls to be determined through an analysis of the true nature of the relationship. The Ontario Court of Appeal, in *General Accident Assurance Co. v. Chrusz* (1999), 180 D.L.R. (4th) 341 at pp. 282-3, has held that a functional approach must be followed and that the relationship is assessed by asking: "Is the function essential or integral to the operation or existence of the solicitor-client relationship?".

Generally, if a third party retrieves information from outside sources and gives the information to the solicitor, or if the third party is retained to act on the solicitor's legal instructions, the third party's function will likely be held to not be essential or integral to the existence of the solicitor-client relationship.

Conversely, where the third party acts as a conduit for information between the solicitor and client, communications between the solicitor and the third party and between the client and third party will be held privileged so as long as the preconditions to the privilege exist.

## 4. IN-HOUSE LAWYERS

Solicitor-client privilege applies with equal force to communications with internal lawyers in government, public agencies and business where the lawyer is a salaried employee. In-house counsel, though having only one client, their employer, are treated no differently than lawyers in private practice with many clients.

Where in-house lawyers give advice in a non-legal capacity, that advice is not protected by the privilege.

## 5. PROSPECTIVE

Canada has been following a path of incremental change to the concept of solicitor-client privilege. This path has only increased the strength and resiliency of solicitor-client privilege. It is not expected that there will be any movement away from the protection currently afforded to the privilege, especially given recent Supreme Court of Canada pronouncements and the application of those pronouncements in provincial courts. Provincial superior courts and courts of appeal have recognized the recent

jurisprudence of the Supreme Court of Canada in the context of criminal law and have begun applying it with equal force in civil cases.