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Updated, June, 2012, by

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1. DEFINITION – PRESENTATION

In Canada, communications between a lawyer and his or her client are protected by solicitor-client privilege where those communications are related to the provision of legal advice, whether or not they are related to litigation. More specifically, 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 Supreme Court of Canada has deemed this privilege a quasi-constitutional right applicable to oral or verbal communications meeting the above criteria. The privilege is permanent unless waived by the client or where the communication falls within a limited array of exceptions.[1] 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. Until 1979, the privilege was considered to be merely a rule of evidence, preventing privileged materials from being tendered as evidence in a court room. From that time, it has become a "fundamental civil and legal right" recognizing the right to privacy between a legal advisor and his or her client.[2] In 1982, it was confirmed to be a substantive right, extending beyond the courtroom "throughout his dealings with others." [3]

The common law remains the primary source of solicitor-client privilege. Privilege has been a top priority for the Supreme Court of Canada, deciding more cases touching on solicitor-client privilege in the 7 years from 1999 to 2012 than in the previous 125 years, from 1875 to 1999.[4]

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*.

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[1] The Supreme Court of Canada (S.C.C.) has recognized two exceptions to Solicitor-Client privilege, including "public safety" and "innocence at stake". However, in practice, there are a number of other exceptions, including those allowing lawyers to reveal privileged information to defend themselves or their associates from charges of malpractice, misconduct or to collect a fee. Furthermore, the S.C.C. has left open the possibility for further exceptions, such as the "national security" exception, for example. The exceptions are outlined further in the body of the paper, below.

[2] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at pp. 839-40, Dickson J.

[3] *Descouteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, pp. 888, Lamer J.

[4] Jamal, Mahmud. "The Supreme Court of Canada on solicitor-client privilege: what every practitioner needs to know" Legaltree.ca < http://www.legaltree.ca/node/792>

Additionally, provincial rules of professional conduct and obligations attaching to licensed legal professionals 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.
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> 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, providing it with constitutional protection under the *Canadian Charter of Rights and Freedoms*.[5] The Supreme Court of Canada has also 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.[6]

Ultimately, the privilege as it currently exists in Canada is best understood as a quasi-constitutional right to communicate in confidence with one's lawyer. Subjects of Canadian law are protected against the voluntary or compelled

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[5] 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.

[6] *Maranda v. Richer*, [2003] 3 S.C.R. 209

disclosure by one's lawyer absent the client's consent or court order. The right also includes a protection against the client being compelled to disclose the information covered by the privilege, in the midst or in the absence of court proceedings.[7]

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.[8]

In addition to the officially recognized exceptions to solicitor-client privilege, in practice there are others, including "lawyers' exceptions" – i.e. exceptions that allow lawyers to disclose confidential information in circumstances where the lawyer needs to establish or collect a fee, or defend the lawyer or their associates or employees against allegation of misconduct.[9]

There is also exists a "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 therefore inapplicable between joint clients, though it continues to extend outward..

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[7] Dodek, Adam "Solicitor-Client Privilege in Canada: Challenges for the 21st Century" Discussion Paper for the Canadian Bar Association. (February 2011).

[8] The public safety exception is more open-ended than (a) and (b), providing flexibility to the lawyer. As articulated by the Canadian Bar Association's *Code of Professional Conduct*, "where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group…..the lawyer shall disclose confidential information where it is necessary to do so in order to prevent the death or harm but shall not disclose more information than is required." (CBA, *Code of Professional Conduct*, c. 4 Rule 2, online: <http:www.cba.org/CBA/activities/pdf/codeofconduct.pdf>)

[9] Ibid at note 7.

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.

Despite the rule limiting waiver to where a client gives informed consent, 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.[10]

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, and the Supreme Court of Canada in *Lavallee* declared that "[u]njustified, or even accidental infringements of the privilege erode the public's confidence in the criminal justice system."[11]

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, however. 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, and will apply whether the discussions take place in a formal mediation or negotiation session or more informal discussions between clients or counsel.[12]

‘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.

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[10] *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209

[11] Ibid at par. 49

[12] see *Middelkamp v. Fraser Valley Real Estate Board* (1992), 96 D.L.R. (4th) 227 (B.C.C.A.) and *British Columbia Children’s Hospital v. Air Products Canada Ltd.* (2003), 224 D.L.R. (4th) 23 (B.C.C.A.)

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.

The Hon. Justice Binnie in *R. v. Campbell* explains, as follows:

> Solicitor-client communications by corporate employees with in-house counsel enjoy the privilege, although (as in government) the corporate context creates special problems: see, for example, the in-house inquiry into "questionable payments" to foreign governments at issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), per Rehnquist J. (as he then was), as pp. 394-395. In private practice some lawyers are valued as much (or more) for raw business sense as for legal acumen. No solicitor-client privilege attaches to advice

> on purely business matters even where it is provided by a lawyer.

Where in-house lawyers give advice in a non-legal capacity, that advice is not protected by the privilege. However, attempting to discern the different roles is a difficult task – a task which continues to be undertaken by Canadian courts.[13]

5. PROSPECTIVE

Canada's courts have been consistently and predictably protecting solicitor-client privilege, and it is not expected that there will be any movement away from this trend, 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. In the coming years, facing a more globalized legal world and novel fact patterns, the interpretation of privilege will inevitably be impacted. Canadian courts are likely to engage in the analysis of other common law countries and further develop a framework which can adequately address the multitude of modern issues, including those existing and anticipated.

6. QUEBEC

The Canadian Province of Quebec has a Civil Law system. Many common law privileges have been introduced into Quebec Civil law. In Quebec, most laws are codified in specific texts. Solicitor-client privilege is applicable in Quebec. Quebec courts often refer to common law cases to interpret the application of solicitor-client privilege in Quebec.

It should be noted that the primary source of solicitor-client privilege in Quebec is found at section 9 of the *Quebec Charter of Human Rights and Freedoms*. Therefore, solicitor-client privilege in Quebec is in some ways distinguishable from the common law interpretation, in that it is a codified quasi-constitutional fundamental right. For this reason, when the solicitor-privilege applies, Quebec courts must give it a large and liberal interpretation so as to avoid violating a fundamental right. This privilege is also protected by the section 60.4 of the Quebec Professional Code – a lawyer who does not respect solicitor-client privilege mat be subject to disciplinary action.

Furthermore, in Quebec, the solicitor-client privilege extends to the profession of notaries. Notaries are primarily responsible for the conveyance of immovable property in Quebec.

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[13] For instance: in *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustees of)*, [1997] O.J. No. 1177, 32 O.R. (3d) 575 (Ont. Gen. Div.) the courts refused to protect communication from in-house counsel when the communication was circulated in the counsel's capacity as a business executive rather than lawyer.