

Privilege Issues for In-House Counsel

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Privilege Issues for In-House Counsel

Solicitor-client privilege

Litigation privilege

Rules of Professional Conduct

Employment contract

CBA Code of Professional Conduct

Solicitor-Client Privilege

Belongs to client

Can only be waived by client

Privileged information is permanently protected from disclosure

Solicitor-Client Privilege

A substantive right, not just a rule of evidence

Time of communication = privilege

Implications?

Solicitor-Client Privilege

Investigative powers of statutory bodies

e.g. a judicial officer must assess claims of privilege in connection with search warrants, general production orders and financial production orders under the *Criminal Code*

e.g. only courts can review documents to determine privilege: *Privacy Commissioner of Canada v. Blood Tribe Department of Health*

Solicitor-Client Privilege

Three-part test:

1. Communication between solicitor and client
2. For the purpose of seeking or receiving legal advice
3. With intention that communications be confidential

Solicitor-Client Privilege

Onus is on party asserting privilege

1. Communications between solicitor and client

In-House lawyers and their clients have the same privileges as lawyers in private practice: *Alfred Crompton Amusement Machines Ltd. v. Customers and Excise Commissioners (No. 2)* per Denning LJ

Potential challenges to privilege

Legal advice to affiliates: *Mutual Life Ass. Co. of Canada v. Canada*

In-House counsel not qualified to practice law: *Gucci America Inc. v. Guess? Inc.*

Legal jurisdiction does not recognize privilege for inhouse lawyers: *Akzo Nobel Chemicals v. European Commission (ECJ, 2009)*

Potential challenges to privilege cont.

Dual role dilemma: what if In-House legal advisor not employed as a lawyer and/or not acting in that capacity at the relevant time?

The legal advisor must be scrupulous to make the distinction: *Alfred Crompton*

TD Bank v. Leigh Instruments Ltd. (Trustee of)

Was information obtained in the performance of duties that can be, and usually are, performed by an employee or agent who is not a lawyer?

A court may draw inferences from a document if the issue is not clear

2. For the purpose of seeking or giving legal advice

Any consultation for legal advice, even if the lawyer does not agree to be retained

3. With intention that communications be confidential

Controlled circulation, warnings on the face of a document, content.

**Any or all may be determinative: *TD*
*Bank***

Exceptions

Legal advice is sought for the purpose of conducting criminal activity

Public safety is at stake (where there is a clear and imminent risk of serious bodily harm or death to an identifiable person or group)

Genuine risk of wrongful conviction: *R. v. McClure*

**Abrogated by clear and unequivocal terms of statute:
*Pritchard v. Ontario Human Rights Commission***

Litigation Privilege

Belongs to client

Can only be waived by client

Time limited protection

Litigation Privilege

“Lawyer’s Brief” / “Solicitor’s Work Product” Rule

Broader than solicitor-client privilege to include non-confidential communications and material of a non-communicative nature

Dominant purpose of preparation must be contemplated or pending litigation

Litigation Privilege

Privilege not extended to files compiled for the purpose of giving legal advice: *TD Bank*

Actual Waiver of Privilege

Client knows of the existence of the privilege

AND

**Client voluntarily evinces an intention to waive
privilege**

Deemed by Implication Waiver of Privilege

Where consistency and fairness dictate: *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, McLachlin J.

e.g. *TD Bank*

Waive part of communication, waive all

Reliance on legal advice as an element of claim or defence

Put state of mind of individual or corporation in issue

Waiver cont.

**“...mere physical loss of custody of a privileged document does not automatically end the privilege”
(Sopinka, Lederman & Bryant: *Evidence in Civil Cases*)**

A judge has discretion to determine whether privilege has been waived

Non-Waiver Disclosure Situations

Remedy to protect the non-waiving litigant and/or

Remedy to protect the integrity of the administration of
justice

Is there a real risk that opposing counsel will use the information?

Passive or active possession of privileged information?

Possession by unscrupulous “stealth” of opposing counsel?

Did unauthorized possessor take immediate steps to identify, protect and maintain the privilege?

Typical Remedy

Remedy is often disqualification

Fanciful, speculative or imaginary risk will not warrant
remedy of disqualification: *Celanese*, *Moldaver J.*

Ultimate Remedy

Stay of proceedings

A stay of proceedings is a prospective remedy. A stay of proceedings does not redress a wrong that has already been done. It aims to prevent the perpetuation of a wrong, which, if left alone, will continue to trouble the parties and the community as a whole in the future: *Canada (Minister of Citizenship & Immigration) v. Tobias* cited in *Autosurvey Inc. v. Prevost*

Rules of Professional Conduct

2.03 is wider than rules of privilege:

Twinned with duty of loyalty

Applies regardless of the source of the information

Practical Tips to Protect Confidentiality/Privilege

**Consider capacity in which you provide advice,
purpose of request**

**Restrict circulation of documents and attendance at
meetings**

Segregate privileged and non-privileged documents

Practical Tips cont.

Assert common-interest privilege explicitly in dealings with affiliates and document the arrangements.

Be careful about sharing privileged information with non-Canadian affiliates

Consider whether separate representation for affiliates may be warranted

Practical Tips cont.

Label privileged and confidential documents

Use encrypted e-mail

Exercise care in forwarding documents by e-mail

Do not bcc client on e-mails to opposing counsel

Don't fool around: counsel held to very high standard

It matters not that [counsel] was well intentioned. The passing grade is 100%, not 50.1% or best efforts: *Nova Growth Corp. v. Kerpinski*

THANK YOU