

The Law of Privilege

In-House Counsel Professionalism Conference Spring 2011

Larry Elliot & Neil Guthrie

Borden Ladner Gervais LLP

Telephone: 613.787.3537 / 416.367.6052

Email: l Elliot@blg.com / nguthrie@blg.com



AGENDA

- **LSUC rule 2.03: confidentiality**
- **main types of privilege**
 - solicitor-client
 - litigation
 - common-interest
 - settlement
- **application to in-house counsel**
- **jurisdictional issues**
- **limits of privilege**
- **case studies**
- **practical tips to protect privilege**
- **what do you do if you inadvertently receive privileged documents?**

LSUC RULE 2.03 :Confidentiality

- **must hold info related to business & affairs of client in strictest confidence, to allow absolute candour in relationship**
- **must not divulge unless authorised by client or required by law**
- **2.03 is wider than evidentiary rules of privilege**
 - twinned with duty of loyalty
 - applies regardless of source or nature of information
 - survives professional relationship
- **disclosure permitted in narrow circumstances:**
 - order of court or tribunal (but only as much as necessary)
 - reasonable belief of imminent risk of death or serious bodily harm and disclosure necessary to prevent
 - in response to allegations of criminal activity, civil liability with respect to client's affairs, malpractice or misconduct

TYPES OF PRIVILEGE

A Brief Refresher

Solicitor-client privilege

- protects communications between lawyer and client
- if required for provision of legal advice
- may extend to communications with agents and third parties
- duration: permanent

Litigation privilege

- communications arising where litigation in existence or reasonably in prospect
- can cover a wide range of communications, not just between lawyer and client
- ‘dominant purpose’ test
- duration: ends with the litigation, unless ‘related’ proceedings continue

TYPES OF PRIVILEGE

A Brief Refresher

Common-interest privilege

- applies where an existing S-C or lit. privilege
- extends privilege as against 3rd parties where information shared among parties with common legal interest (e.g. affiliates)
- to the extent there is a nexus with obtaining legal advice
- first applied to litigation, now (in Canada) in transactional context

Settlement privilege

- 3 conditions: (1) litigious dispute in existence or contemplation; (2) communication made with express or implied intention not to be disclosed to court if discussions fail; (3) purpose is to attempt to effect settlement

YOU'RE LAWYERS

Usual Rules Apply

Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. [...] They are regarded as by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. *They and their clients have the same privileges.*

Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2), [1972] 2 QB 102 at 129, per Denning LJ [emphasis added]

JURISDICTIONAL ISSUES

- **must be qualified to practise in jurisdiction where advice provided**
- **problem for corporate counsel advising clients in other jurisdictions**
- **maybe privilege does not attach**

United States v Mammoth Oil Co (1925) 56 OLR 635 (CA)

US citizen asked Canadian lawyer for advice on US law; not privileged

JURISDICTIONAL ISSUES

- **but maybe privilege does attach**
 - *Mutual Life Ass. Co. of Can. v Canada* (1989) 28 CPC (2d) 101 (at least where management of affiliates very closely intertwined)
 - *Gucci America Inc v Guess? Inc* (SDNY, 2010, 2011)
 - Gucci's VP legal's status 'inactive' in California when hired
 - trial judge: communications with employer not privileged
 - reversed on appeal: communications intended to be privileged, employer not required to keep checking VP's status
- **perhaps akin to preliminary, pre-retainer discussion with lawyer in private practice**
- **BUT opinion issues**
- **AND licensing issues**
 - court in *Gucci* case said VP should have ensured he was properly licensed

PRIVILEGE LIMITS

- **applies as much to communications of in-house counsel as to lawyers in private practice**
- **BUT note that privilege applies only where it applies**
 - does NOT protect business or other non-legal advice provided by in-house counsel
 - requester of advice must need it to understand his or her legal position, not for a business purpose, background information
- **AND opportunities for waiver may be greater in in-house context**

NOT ALL ADVICE YOU PROVIDE IS PRIVILEGED

- **Denning LJ in *Alfred Crompton*:**

It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction.

- **line between legal and business advice is easily blurred**

Mandeville v Manufacturers Life Insurance Co, 2004 CarswellOnt 9988; *Pritchard v OHRC* (2003) 63 OR (3d) 97

- ***Re OSC and Greymac Credit Corp* (1983) 41 OR (2d) 328**

- president of Greymac, a lawyer, found not to be able to assert privilege
- information he acquired could have been obtained by non-lawyer employee or agent of company
- not received for purposes of taking legal advice

CROSS BORDER ISSUES

- **what is privileged in Canada will generally be privileged in the US**
- **but note:**
 - common-interest privilege does not extend to transactions in US; litigation only
 - communications shared with US parties may be discoverable under US Federal Rules of Civil Procedure
 - some European jurisdictions do not recognise solicitor-client privilege in relation to advice provided by in-house counsel
 - when in doubt, consult outside counsel

CASE STUDY #1: *Saturley v CIBC*

World Markets Inc, 2010 NSSC 361

- **S developed a trading strategy based on third-party software**
- **third party made an error, resulting in \$28 million in losses to CIBC**
- **S detected error, notified manager; subsequently fired**
- **in wrongful dismissal suit, S sought production of meeting notes, e-mail**
- **many of CIBC's claims of privilege failed**
 - general counsel's e-mails showed 'no sign of offering legal advice', nor was GC being informed by others so as to provide legal advice
 - merely spotting issues for possible follow-up by compliance department wasn't legal advice
 - meetings of managers on S issue included lawyers but dealt with a variety of issues (media, investor relations, regulatory affairs) – no litigation privilege because not dominant purpose
 - meetings considered whether to fire S but not how to respond to potential wrongful dismissal claim – again, no litigation privilege

CASE STUDY #2: *TD Bank v Leigh Instruments Ltd (Trustee of)* (1997) OR (3d) 575

- **TD legal maintained file on subject of comfort letters**
- **LI's parent provided such a letter to TD in connection with loan**
- **LI's trustee sought disclosure of TD legal's file**
- **TD's assertion of privilege had mixed success:**
 - internal memo on comfort letters widely circulated within bank
 - not marked 'privileged and confidential'
 - written by GC in executive not legal capacity on matter of corporate policy
 - second memo to narrower group prepared by counsel at request of GC was privileged because it responded to a request for legal advice
 - miscellaneous articles and publications on comfort letters not privileged because not gathered with a view to providing specific legal advice

PRIVILEGE

Some Further Issues

- **TD also found to have waived its privilege by putting its state of mind in issue in the litigation**
 - that is, indicated that it sought legal advice on the issue of comfort letters
 - in doing so, waived privilege; unfair to allow party to state basis for action but be able to withhold actual advice
- **erosion of in-house privilege?**
 - *Akzo Nobel Chemicals v European Commission* (ECJ, 2009)
 - privilege does not attach to communications between in-house counsel and client, at least in competition matters
 - outcry from English and European lawyers ignored

PRACTICAL TIPS TO PROTECT PRIVILEGE

- **consider capacity in which you provide advice, purpose of request**
- **restrict distribution and meeting attendance on 'need to know' (for purposes of obtaining legal advice) basis**
- **label privileged documents**
 - not dispositive but helpful
 - better to have to fight a challenge than establish privilege from scratch?
 - consider carefully your e-mail notification/disclaimer
- **segregate privileged documents from non-privileged documents**
- **use encrypted e-mail**
- **be very careful in forwarding documents by e-mail**
- **don't bcc your client on e-mail to opposing counsel**
- **consider alternatives to third-party involvement**
- **assert common-interest privilege explicitly in dealings with affiliates, document the arrangements (including termination)**
- **be careful about sharing privileged information with non-Canadian affiliates**
- **consider whether separate representation for affiliates may be warranted**

What do you do if you inadvertently receive privileged documents?

- **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*)

- **as soon as possession recognised:**

- immediately return all copies, unread
- if electronic, double delete at very least
- advise of extent to which actually reviewed
- may need to advise of any use intended to be made

SANCTIONS FOR MISUSE

- **may include:**
 - award of costs
 - removal of counsel
 - termination of proceedings
- **in determining sanction, court may consider:**
 - how material came into your possession
 - how you reacted on recognition
 - extent of review of privileged material
 - contents of material, whether prejudicial
 - stage of litigation
 - could appropriate precautions have avoided the mischief?

Autosurvey v Prevost (Ont. SCJ, 2005)

- **extreme case**
- **plaintiff in IP infringement case hacked into defendant's server, obtained privileged and confidential documents**
- **plaintiff's lawyer informed, advised client to 'secure its property, preserve the evidence and note the contents'**
- **access not disclosed to defendant, although he became aware that plaintiff had removed documents, tried to cover tracks**
- **remedy:**
 - removal of plaintiff's lawyer
 - termination of action
 - costs on substantial indemnity basis

THANK YOU!