

**PRIVILEGE
PRESERVATION
PRACTICES
FOR IN-HOUSE COUNSEL**

(presentation notes)

**Michael Gianacopoulos and Jason Yamashita
Farris, Vaughan, Wills & Murphy LLP
Vancouver, BC Canada**

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A) WHY PRESERVATION OF PRIVILEGE MATTERS

The confidentiality protected by solicitor-client privilege ensures that clients may freely discuss facts with their lawyers, as the encouragement of the free flow of legal advice is in the public interest.

On a more practical level, having to share legal advice, opinions and other confidential information with third parties who are adverse will almost always be prejudicial to a client’s interest. That is quite apart from the annoyance experience by client and solicitor alike when the enemy gets to go through your confidential thought processes.

Because they may have multiple roles which include a non-legal function, in-house counsel face special privilege preservation challenges. In their day-to-day practice, in-house counsel can follow certain basic practices minimizing the risk of having to share confidential information with third parties. Privileged preservation requires a recognition of the basic privilege issues together with the adoption of a practice and how and when privilege can be preserved.

B) BASIC PRINCIPLES

The focus here is on solicitor-client privilege (as opposed to litigation, settlement and other types of privilege) as type of privilege poses some unique issues for in-house counsel.

1) Definition and Elements

Solicitor-client privilege arises where communications or interactions of any sort are made in confidence between a client and his or her lawyer for the purposes of either seeking or giving legal advice. The Supreme Court of Canada has adopted the classic Wigmore definition of privilege:

Where legal advice of any kind is sought from a professional legal adviser, in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.¹

¹ *R. v. Campbell*, [1999] 1 S.C.R. 565; *R. v. McClure*, 2001 SCC 14; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Canada v. Solosky*, [1980] 1 S.C.R. 821; *R. v. Howley*, [1927] S.C.R. 529.

The privilege applies to communications with internal counsel in governments, public agencies and businesses where lawyers are salaried employees.² Solicitor-client privilege may protect communications without a formal legal relationship or retainer having been issued as long as the communications are made in the context of requesting or giving legal advice.³

Solicitor-client privilege belongs to the client and not to the lawyer; a solicitor is not permitted to disclose a client's confidence.⁴ In the case of in-house counsel, solicitor-client privilege belongs to the company and can only be waived by the company.⁵

2) Legal vs Business Functions: Which Hat Are you Wearing?



For in-house counsel, privilege will attach only where the communication is in their legal capacity.

Justice Binnie has noted that “[i]n 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.”⁶ In-house counsel face special difficulties in drawing a line between their legal advice and other lawyer functions, which are protected by privilege, and their business advice and other non-legal activities, which are not protected.

² *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] All E.R. 353 (C.A.); *R. v. Shirose* (1999), 133 C.C.C. (3d) 257 (S.C.C.).

³ *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

⁴ *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143.

⁵ Adam M. Dodek and Jeffrey G. Hoskins, *Canadian Legal Practice* at §21.20.

⁶ *R. v. Campbell*, [1999] 1 S.C.R. 565.

Courts considering these roles must assess each situation on a case-by-case basis to determine if the circumstances are such that privilege arises.⁷ This determination depends on the nature of the relationship, the subject matter of the advice and the circumstances in which the advice was sought and rendered.⁸

The law applicable to in-house corporate counsel was addressed in *Toronto-Dominion Bank v. Leigh Instruments*:

[27] The law on this point is clear. In order for a communication from an in-house lawyer to attract solicitor-client privilege, it must have been made while he or she was acting in their capacity as such. Lord Denning M.R. stated the principle in *Alfred Crompton, supra*, at pp. 376-77:

I have always proceeded on the footing that the communications between the legal advisors and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned. There are many cases in the books of actions against railway companies where privilege has been claimed in this way. The validity of it has never been doubted. I speak, of course, of their communications in the capacity of legal advisors. It does sometimes happen that such a legal advisor 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 advisor must be scrupulous to make the distinction. (emphasis added) Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser.

[28] This proposition was adopted by Saunders J. in *Mutual Life Assurance Co. of Canada v. Canada (Deputy Attorney General)* (1988), 28 C.P.C. (2d) 101 at p. 104, 88 D.T.C. 6511 (Ont. H.C.J.):

⁷ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31.

⁸ *R. v. Campbell*, [1999] 1 S.C.R. 565.

The communications are privileged if they concern the employee's function as a lawyer and are not privileged if the lawyer is performing a business or other function.

Other examples of this issue coming before the court is an Ontario court order an in-house counsel to be produced as the company representative for examination for discovery where he had knowledge of the facts related to the subject matter at issue. Even though that knowledge was acquired through his in-house counsel position, he was not entitled to a blanket privilege protection, but was required to establish privilege in response to individual questions.⁹ Questions are admissible to reveal and determine the purpose for which a client sought advice.¹⁰

A recent British Columbia Supreme Court decision rejected the argument that a corporate external counsel's activities ought to be divided into discrete categories including several said to go beyond legal advice where the activities fell broadly within the retainer and were legal in nature.¹¹ The activities which fell within the scope of the retainer and constituted provision of legal services included:

- (a) dealing with and issuing instructions to an appraiser;
- (b) signing payment and tax forms on behalf of the client; and
- (c) negotiating positions on behalf of the client.

The authorities on the distinction between legal and business advice given by in-house counsel remains an underdeveloped one with substantial gray areas. Prudent counsel should consider that the further removed a communication is from the seeking or giving of legal advice, the more likely it is that privilege will not attach.

3) In Confidence

Another basic requirement is that privilege will not attach unless the communication is intended to be made in confidence.

In *TD Bank v. Leigh*¹², the Bank sued a company to which it loaned \$40.5 million on the basis that it relied on comfort letters to its detriment. Solicitor-client privilege was claimed over a head office circular from the senior vice president that was circulated by the Bank's general counsel and secretary to various

⁹ *Wexler v. Suncor Energy Products Inc.* (2007), 155 A.C.W.S. (3d) 1008 (Ont. S.C.J. (Div. Ct.)).

¹⁰ *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31.

¹¹ *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88.

¹² *Infra*, note 14.

divisions as a matter of practice. The circular was found not the privileged on two grounds – first, the lawyer was not acting in his capacity as a solicitor, but instead as a business executive when he had made the communication and secondly, the circumstances showed that the documents were not intended to be kept confidential.

4) Exceptions to Privilege

The Supreme Court of Canada has stated on numerous occasions that solicitor-client privilege must be as close to absolute as possible to ensure public confidence, yielding only in certain clearly-defined circumstances.¹³ The small number of strictly applied exceptions which prevent privilege from attaching include: (a) public safety; (b) innocence at stake, and (c) future crimes and fraud.¹⁴ This latter exception is said to be broad enough to include breach of statute, contract and common law duty where such unlawful conduct is intended (ie. to be perpetrated in the future).

5) Duration

Solicitor-client privilege is permanent in duration: “once privileged, always privileged”.¹⁵ The privilege is not lost after death of the person, bankruptcy or after assignment in bankruptcy, nor is it waived by the striking of a company from the register.¹⁶

6) Waiver

The leading case on waiver of privilege states:

Waiver of 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. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of the communication, will be held to be waiver as to the entire communication.¹⁷

¹³ See e.g. *R. v. McClure*, 2001 SCC 14; *Lavallee, Rackel & Heintz v. Canada (AG)*, 2002 SCC 61; *Privacy Commissioner of Canada v. Blood Tribe Department of Health*, 2008 SCC 44.

¹⁴ *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. Brown*, 2002 SCC 32.

¹⁵ *Blank v. Canada (Min. of Justice)*, 2006 SCC 39.

¹⁶ Robert H. Hubbard *et al.*, *The Law of Privilege in Canada* at 11-25.11 (Nov. 2010).

¹⁷ *S&K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, [1983] 4 W.W.R. 762 (B.C.S.C.)

7) Privilege and Foreign Jurisdictions

It should be noted that the nature and scope of the protections afforded by privilege may be substantially different outside of Canada (and in Québec). For example, a recent decision of the European Court of Justice rejected the extension of privilege to communications with an attorney in the employ of a client. *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. European Commission* limited attorney-client privilege to communications connected to the client's right of defence on exchanges emanating from independent lawyers, that is, from lawyers who are not bound to the client by a relationship of employment.¹⁸

¹⁸ *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. Commission*, C-550/07 P, (2010). For comments, see e.g. Nikki Tait, "Europe court limits in-house legal privilege" *Financial Times* (September 14, 2010); Marcia Coyle, "European Court Limits Attorney-Client Privilege for In-House Counsel" *The National Law Journal* (September 15, 2010).

C) FACT PATTERN – SOUND FAMILIAR?

Suppose you are in-house counsel at a technology firm and you are presented with the following scenarios:

1. Potential employee M is being interviewed for the position of Regional Sales Manager. Because you are considered to have good judgment of people, you are invited to participate along with the HR manager and the VP of Operations in M's final interview and to comment on M's suitability for the position.
2. M is subsequently offered the Regional Sales Manager position and accepts. You are asked to draft an employment contract for M. Because the position requires extensive client contact and familiarity with proprietary technical information, you are asked to draw up a detailed confidentiality and non-solicitation agreement.
3. A year after M's hiring, you learn from the HR manager that M has some performance issues. You attend a meeting at which it becomes clear that M has failed to meet key sales targets. While the focus of the meeting is on M's performance, the company's general sales performance is also discussed. You provide some legal advice on verbal and written warnings to employees.
4. After several warnings to M, the HR manager asks you to prepare a final warning letter. The HR manager signs and sends the letter to M.
5. Several months after the final warning letter, you are informed by the HR manager that M's sales figures have not improved. The HR manager asks you to prepare and send a termination letter.
6. Two months after M's termination, management becomes aware of rumours that M is now in the employ of a competitor and has been soliciting corporate clients away. You are asked to make some phone calls to the firm's sales staff and to some clients. The sales staff express valid concerns. You investigate and, after detailed conversations with several clients, learn that

some have been contacted by M and are considering switching business to the competitor.

7. You reach the conclusion that M is in breach of the non-solicitation covenants and suggest to management that advice of outside counsel should be sought. You do so and receive litigation counsel's written opinion that certain litigation steps should be taken towards seeking an injunction.

D) FACT PATTERN DISCUSSION POINTS

1. Interview Attendance:
 - (a) Should counsel attend?
 - (b) If so, does privilege attach?
 - (c) What kinds of issues should counsel be aware of if he or she wishes to send an email with additional comments on M's interview?
2. Drafting Employment Documents:
 - (a) Who should see counsel's drafts of the contract?
 - (b) If counsel requires the input of technical staff on defining and using certain terms in the contract, what considerations arise in seeking that input?
 - (c) How can management circulate, discuss and consider the drafts of the contract without waiving privilege?
3. Attending Meeting re: Performance
 - (a) What issues should counsel consider in providing legal advice in a predominately business-focused meeting?
4. Preparation of Warning Letter:
 - (a) Does privilege attach to this letter?
 - (b) What concerns might arise from this letter being drafted by counsel?
5. Termination Letter:

(a) Who should sign the termination letter?

6. Participation in Investigation:

(a) What issues should be considered once the possibility of litigation arises?

(b) Should in-house counsel be communicating with internal staff under these circumstances?

(c) Should in-house counsel be communicating with external clients under these circumstances?

7. Litigation Counsel opinion:

(a) Who should the opinion be circulated to?

(b) If sales staff members inquire as to what steps will be taken, what do you tell them?

E) SUMMARY: PRIVILEGE PRESERVATION PRACTICE POINTS FOR IN-HOUSE COUNSEL

1. Know where the line is: know when you are acting in your legal capacity and when you are acting in your non-legal capacity.
2. Separate legal advice from other discussions. Mix the two as little as possible.
3. Circulate/distribute legal advice only to the individuals who have a need to know it.
4. Ensure legal advice is identified as legal advice. E.g. “Confidential – Subject to Solicitor-Client Privilege”.
5. Caution clients that privileged communications should not be disclosed to third parties. They should not be referred to in any way.
6. Be conscious that different jurisdictions may have substantially different laws of privilege.
7. If you are facing a more complicated situation involving separate legal entities which are a part of your client’s corporate group (particularly where there is the potential for adversity among the members). Consider recent developments in the law.¹⁹

¹⁹ See e.g. In re *Teleglobe Communications Corp.*, 493 F.3d 345 (3d. cir.2007); Adam Dodek – “Solicitor-Client Privilege in Canada” (Discussion Paper for the Canadian Bar Association, February 2011).