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A robust protection: maintaining solicitor-client privilege

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Solicitor-client privilege is a cornerstone of our legal system. Not only is it a legal and civil right, it is also a principle of fundamental justice. Once established, it acts as an impenetrable cloak of confidentiality, capable of being displaced only in narrow circumstances. For organizations and individuals that need legal advice to respond to risks or to plan business strategies, this cloak is an invaluable reassurance and a crucial factor in their ability to seek that advice.

The jurisprudence is clear that solicitor-client privilege must be "as close to absolute as possible," and that it should only be disturbed when absolutely necessary. In 2023, courts across the country have shed light on the parameters of the doctrine — specifically, in the context of waiver and legislative abrogation — further affirming that solicitor-client privilege will only be disturbed in the clearest of cases.

Not only do these cases highlight the robust protection that is afforded to solicitor-client privilege, but they provide valuable insight into its preconditions and parameters. These preconditions and parameters form the foundation of best practices for organizations to follow going forward.

Brief overview of solicitor-client privilege

The preconditions of solicitor-client privilege are well-established through appellate case law. Broadly speaking, solicitor-client privilege applies to all communications within the solicitor-client relationship that are made for the purpose of seeking or giving legal advice, and are intended by the parties to be confidential.

For the purposes of finding privilege, the solicitor-client relationship is broadly construed. It applies with equal force in the context of advice given to an administrative board by in-house counsel as it does to advice given in the realm of private law. It has also been found to extend to advice given by lawyers who are not qualified to practise in the jurisdiction where the advice was given.

Although solicitor-client privilege attaches to the entire continuum of communications in the solicitor-client relationship in which advice is sought or given, it does not apply if the

dominant purpose of the communication is not legal. For instance, business advice given by in-house legal counsel will not be privileged unless it is legal in nature.

Solicitor-client privilege will also not attach if the communication was not intended to be confidential. While all communications made within the solicitor-client relationship are *prima facie* confidential, this presumption can be rebutted when it is clear that was not the intention. For example, in *Canadian Flight Academy Ltd. v. Oshawa (City)*, the Ontario Superior Court of Justice found that certain communications were not privileged by virtue of the fact that they had been shared with third parties who were not performing a function central to the client-solicitor relationship.

Displacing privilege: waiver or statutory abrogation

Once established, solicitor-client privilege is broad and all-encompassing, and subject to narrow exceptions, it is rarely displaced. Two exceptions are waiver and statutory abrogation.

Waiver

Solicitor-client privilege can be waived by the client to whom it belongs, either expressly or by implication. In both cases, the waiver must be clear and unambiguous. Case law from 2023 provides important guidance regarding the circumstances in which the court will find an express or implied waiver of privilege.

An express waiver will occur when the client knows of the existence of the privilege and demonstrates an intention to waive it. For instance, an express waiver was found in *R. v. T.G.*, a 2023 decision of the Newfoundland and Labrador Supreme Court, because the client had expressly consented to the disclosure of his privileged information.

However, inadvertent disclosure of information is insufficient to waive privilege. In keeping with the protective approach to solicitor-client privilege, the court will look to the parties' true intentions and only find an express waiver where it is clear that is what was intended. There will also be no waiver of privilege where the disclosing party was unaware that the communications were protected by privilege.

This distinction was highlighted in *R. v. T.G.*, where the court only found an express waiver of the privilege vis-à-vis *some* medical records that defence counsel had disclosed to the Crown. There had been no waiver with respect to an additional set of records as the accused had not been given an opportunity to review them and therefore did not have the requisite knowledge or intention to expressly waive privilege. Although the privilege at issue in *T.G.* was litigation privilege, the same principles of waiver apply.

A waiver may arise by implication if the party asserting privilege places their state of mind at issue in litigation. Unlike express waiver, implied waiver need not be intentional. Rather, the court will consider the entire context and find waiver where fairness and consistency require it. As the British Columbia Court of Appeal confirmed this year in *Peak Products Manufacturing v. Gross*, this will typically arise when a party attempts to benefit by relying on their privileged communications while simultaneously preventing the other party from testing the veracity of their claims.

In *Peak Products Manufacturing*, the plaintiff filed an action to enforce an alleged shareholder agreement. Two weeks before doing so, he had sent the defendants a draft claim that contained allegations beyond those in the filed action. The defendants counterclaimed for defamation and abuse of process, alleging that the statements in the draft pleading were

false and amounted to attempted extortion.

The plaintiff sought to strike the counterclaim on the basis of absolute privilege – a defence to defamation that protects statements made in the course of judicial proceedings – highlighting that his lawyer had conditional instructions to file the lawsuit when he provided the defendants with the draft claim. The defendants argued that the plaintiff had waived solicitor-client privilege by referring to instructions he had given his lawyer, thereby putting his state of mind in issue.

The Court of Appeal declined to find waiver, upholding the lower court's finding that the plaintiff had not put his state of mind in issue. Without more, the plaintiff's referral to conditional instructions he had given his legal counsel did not warrant a disruption of solicitor-client privilege.

The court will also only find an implied waiver if the privileged information is relevant to a material issue in the litigation. For instance, in *Air Passenger Rights v. Canada (Attorney General)*, the Federal Court of Appeal did not find waiver over a privileged set of documents that were primarily about a subject matter that was not in issue in the application.

These recent decisions demonstrate the uniformly narrow judicial interpretation of the doctrine of waiver in Canada, further highlighting that solicitor-client privilege will only be set aside when absolutely necessary to do so.

Statutory abrogation

Solicitor-client privilege can also be abrogated by statute. However, in *Ontario (Auditor-General) v. Laurentian University,* the Ontario Court of Appeal affirmed that the court will only find a statutory abrogation of privilege if the statutory language clearly and unambiguously indicates that the legislature intended that result.

In *Laurentian University*, the Court considered whether the *Auditor General Act* (Ontario) conferred upon the Auditor General of Ontario the authority to access and compel the disclosure of privileged information from recipients of government grants. Justice Tulloch dismissed the appeal, upholding the application judge's finding that the statute did not unambiguously refer to the abrogation of privilege. He held that, while the legislature does not necessarily need to use the term "solicitor-client privilege," the language of the statute must be clear and explicit, and demonstrate an unambiguous intent to do away with the privilege. Open-textured language is insufficient, as privilege cannot be abrogated by inference.

Laurentian University confirms that there is no exception – not even for the Auditor General, who typically has very broad powers to compel production – to the general principle that Canadian courts will not displace solicitor-client privilege unless it can be absolutely certain that such a result is necessary or was intended.

Best practices for protecting privilege

Although this recent case law provides helpful confirmation that the courts will continue to treat solicitor-client privilege as robust and nearly absolute, it is important to strictly abide by the privilege's requirements to ensure that privileged communications remain protected.

Businesses and their counsel should consider a number of best practices when dealing with potentially privileged information. For example, when counsel drafts retainers or

instructions, it should be expressly stated that the retainer is for “legal advice.” Counsel should also avoid combining business advice and legal advice in one document, and should specify that the advice is intended to be confidential.

Furthermore, organizations should ensure that they have strong policies and procedures in place designed to protect privilege and to avoid situations where advice is either shared internally beyond those who need to rely on it, or externally without appropriate protections. For instance, there should be limited circulation of legal advice, including within an organization. To be safe, organizations should consider marking all legal advice with “do not forward.”

Finally, counsel should avoid raising legal defences that risk placing an organization’s state of mind in issue. If such a defence is necessary, litigants need to be advised of, and completely understand, the associated risks.