Understanding Claims of Privilege

And How Privilege Can be Lost

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Understanding Privilege

Parties to litigation in Ontario are obliged by our Rules of Civil Procedure to disclose to the opposing parties "every document relevant to any matter in issue that is or has been in [their] possession, control or power", whether or not privilege is claimed[1]. Any relevant document that is not privileged must also be produced to the opposition. The obligation to make full production of relevant documents is grounded in the notion that the truth-seeking process will be advanced, and the parties put on an equal footing if each is obliged to disclose all relevant documentation under his or her control.

What, then, qualifies as a privileged document that will be sheltered from disclosure is a significant question for many litigants who are concerned about maintaining the privacy of their communications with others, particularly given the fact that the Canadian court system is open, and any disclosed documents have the potential to become public.

Privilege is the legal construct by which communications made within the context of certain defined relationships that are premised on the confidentiality of the communications will be sheltered from disclosure to any other persons.[2]

There are 4 types of privilege:

1. Solicitor-client (legal advice) privilege;
2. Litigation privilege;
3. Settlement privilege; and
4. Wigmore's "confidential communications" privilege.

Solicitor-Client Privilege

Solicitor-client privilege has been recognized by the Supreme Court of Canada as a "fundamental civil and legal right."[3] Unlike other forms of privilege, it is now recognized as a substantive rule of law, and is a permanent right, that survives the retainer and even past the client's death. It transcends the other forms of privilege, which are, by in large, evidentiary rules.[4] The privilege belongs to the client, and it is not open to the solicitor or any other person to waive it.

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, Rule 30.02
[2] Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 3rd ed. at para. 14.2 ["Sopinka"]
[3] *Solosky v. The Queen*, [1980] 1 S.C.R. 821
[4] *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319, ["Blank"], at para. 24

The right to engage counsel and obtain legal advice without fear of disclosure of the communications to any other person is recognized as essential for the proper functioning of our legal system. In its absence, clients might not be fully candid with their legal advisors, and failing full and frank disclosure, the lawyer is unable to properly advise and counsel the client. As Fish J. explained in the *Blank* case:

> It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.[5]

Solicitor-client privilege encompasses "all information which a person must provide in order to obtain legal advice, and which is given in confidence for that purpose."[6] Solicitor-client privilege does not attach to every conversation between a lawyer and her or his client. It will only arise when the following factors are present:

1. *The communication must be between a solicitor and client*. This applies even if there is no formal retainer between the solicitor and client, as long as the other criteria are met;[7]

2. *The communication must be made in confidence*. However, the communication need not expressly be made in confidence, as long as the circumstances indicate that the parties to the communication intended to keep it secret;[8] and

3. *The communication must be made in the course of seeking legal advice*. Only those communications between a solicitor and client made for the purposes of seeking and obtaining the solicitor's advice on legal matters are protected, and it does not apply when the lawyer is acting as a business counsellor or in some other non-legal capacity.[9]

The Courts have consistently emphasized the breadth and primacy of solicitor-client privilege. It is zealously protected to maintain confidentiality "as close to

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[5] *ibid,* at para. 26;
The same proposition was reiterated by Binnie J. in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 ["*Blood Tribe*"] at para. 9
[6] *Descôteaux v. Mierzwinski,* [1982] 1 S.C.R. 860
[7] *ibid*, at p. 413
[8] Sopinka*,* supra, fn 2, at para. 14.48.
[9] *Ibid*. at para. 14.71;
Blood Tribe, supra, fn. 5, at para. 10

absolute as possible."[10] Unlike other forms of privilege, there is no balancing of competing interests – except in defined circumstances, discussed below, solicitor-client privilege is paramount.

Since paralegals are now licensed by the Law Society of Upper Canada, there is an open question as to whether or not solicitor-client privilege will extend to communications between licensed paralegals and their clients. In a case predating the licensing of paralegals, Master Dash found that privilege could apply on a case-by-case Wigmore analysis of communications that are intended to be held in confidence[11]. It is the writer's view that the mere fact that some paralegals may now be subject to supervision of a governing body is not a sufficient basis upon which to expand this substantive rule of law to include communications between a paralegal and his or her client. Protection on a case by case analysis is adequate and sufficient protection and will meet the relevant policy objectives.

Solicitor-client privilege may also extend to communications between lawyers and third parties in circumstances where the third party can be characterized as an "agent" of the solicitor or client.[12] If the third party is used to facilitate giving the legal advice, or is otherwise essential to the relationship, then the privilege extends to his or her communications with counsel or the client[13]. For example, where the client or solicitor must employ the skills of an accountant, actuary or IT professional to understand and interpret the client's information, then the privilege may be extended.[14]

Similarly, it has been found that a report of an internal investigation of allegations of forged bank drafts was covered by solicitor-client privilege because the report was prepared by the client for the purposes of in-house counsel providing legal advice to the bank[15]. The report was found to be analogous to a document prepared by a client that sets out the key facts of their case, and thereby informs the lawyer of the salient facts.

A "functional analysis" will be employed by the courts to determine if the role assumed by the third party is sufficient to qualify as an agent. If the purported agent's services are necessary for the solicitor to be able to provide her or his professional advice, then the privilege should apply. As explained by Doherty J.A. in *Chrusz*:

> I agree with the Divisional Court that the applicability of client-solicitor privilege to communications involving a third party should

[10] *R. v. McClure*, [2001] 1 S.C.R. 445, at para. 35
[11] *Chancey v. Dharmadi* (2007), 86 O.R. (3d) 612 at para. 33, 34, 39
[12] *Susan Hosiery Ltd. v. M.N.R.,* [1969] D.T.C. 5278 (Ex. Ct.)
[13] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) ["*Chrusz*"] at para. 106, 120
[14] Sopinka, supra, fn. 2, at pp. 742 - 743
[15] *Royal Bank of Canada v. Société Générale (Canada)*, [2005] O.J. No. 4383 (QL) (S.C.J.)

> not be determined by deciding whether Mr. Bourret is properly described as an agent under the general law of agency. I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
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> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor for the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.[16]

However, as was confirmed in *Pearson v. Inco*[17], where a third party is merely retained to gather information which is passed on to counsel, who then uses the information to provide legal advice, no solicitor-client privilege will apply to the communications between the lawyer and the information-collector.

In some cases, separately represented parties may have a common interest in litigation (existing or anticipated) or a common commercial interest[18]. Here, it is possible that communications among the clients and their counsel will also qualify for solicitor-client privilege, so long as the communications are in respect of matters involving the common concern. It is strongly recommended that if parties intend to rely upon a common interest claim to assert solicitor-client privilege over joint counsel meetings, then the intent should be documented, and the limits of the privilege clearly articulated in the agreement among the parties. In that way, the confidentiality of the communications will be certain, and the privilege should also be applied on the case-by-case Wigmore analysis as well.

There are a limited number of exceptions to the solicitor-client privilege, which are to be distinguished from situations of waiver. These include:

(a) when there are issues of public safety at play;

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[16] *Chrusz,* supra, fn. 13, at para. 120, 121
[17] *Pearson v. Inco Ltd.,* [2008] O.J. No. 3589 (S.C.J.)
[18] *Maximum Ventures Inc. v. de Graaf,* [2007] B.C.J. No. 2355 (QL) (C.A.);
Catalyst Fund Limited Partnership II v. IMAX Corp., [2008] O.J. No. 1495 (QL) (S.C.J.)

(b) when the interpretation of a will is in issue, then the solicitor who drafted the will may be called upon to address the testator's intent;

(c) when an accused person requires the communication to prove innocence; and

(d) when the communication is itself criminal or the advice is sought to facilitate the commission of a crime or fraud.[19]

In the case of *Dublin v. Montessori*[20]*,* Justice Perell sought to extend the fourth exception to intentional torts. Leave to appeal was granted, but the appeal was apparently not argued. The issue remains to be determined in the appropriate future case.

In summary, solicitor-client privilege is a substantive right belonging to the client. As a matter of policy, the privilege is meant to encourage full and frank and honest disclosure of all information that a solicitor requires in order to provide valid and helpful legal advice to a person who requires the assistance of counsel to navigate the complicated matrixes of litigation, commercial transactions or other areas of our increasingly regulated society.

Litigation Privilege

Litigation privilege is similar to, and can overlap with solicitor-client privilege. However, it only applies in situations of anticipated or pending litigation, and the document must have been prepared for the dominant purpose of the litigation (although there may be other intended purposes for the document, as well).[21] Additionally, and importantly, unlike solicitor-client privilege, litigation privilege ends with the resolution of the action, or any closely related proceedings, as at that time, the purpose of and need for the protection is at an end.[22]

The purpose of litigation privilege is to provide the litigant and his or her counsel with a zone of privacy in which to prepare the case to the client's best advantage, thereby enhancing the efficacy of the adversary process. The theory is that encouraging adversarial preparation will ultimately further the truth-finding process, i.e. diligent preparation will result in each side having a more complete case to put to the judge, and the judge will then be in a better position to resolve the issues fairly.[23] Thorough preparation is encouraged when counsel are able

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[19] Podrebarac and Bida, *Keeping Secrets and Protecting Confidential Documents and Information in Litigation,* (2010) 37 Adv. Q., p. 215;
Descôteaux, supra fn. 6 at p. 881
[20] *Dublin v. Montessori Jewish Day School of Toronto* (2007), 85 O.R. (3d) 511 (S.C.J.)
[21] *Chrusz,* supra fn. 13, at para. 60;
Blank, supra, fn. 4, para. 60
[22] Sopinka, supra fn. 2, at p. 751;
Blank, supra, fn. 4, at para. 34 - 41
[23] *United States of America v. American Telephone and Telegraph Company* (1980) U.S. App. Lexis 14066

to control the presentation of facts to the court, including both what facts will be adduced, and the manner in which they will be presented without the fear of disclosure of their preparations and investigations to the other side.[24] If trial counsel were compelled to turn over their work product to the opposite side, then vigorous pre-trial preparation would be systemically discouraged, and the truth-finding process would be compromised.

In *Regional Municipality of Ottawa-Carleton v. Consumers' Gas Co. Ltd. et al.*, O'Leary J., on behalf of the Divisional Court explained the purpose of litigation privilege as follows:

> The adversarial system is based on the assumption that if each side presents its case in the strongest light the court will be best able to determine the truth. Counsel must be free to make the fullest investigation and research without risking disclosure of his opinions, strategies and conclusions to opposing counsel. The invasion of the privacy of counsel's trial preparation might well lead to counsel postponing research and other preparation until the eve of or during the trial, so as to avoid early disclosure of harmful information. This result would be counter-productive to the present goal that early and thorough investigation by counsel will encourage an early settlement of the case. Indeed, if counsel knows he must turn over to the other side the fruits of his work, he may be tempted to forgo conscientiously investigating his own case in the hope he will obtain disclosure of the research, investigations and thought processes compiled in the trial brief of opposing counsel: …"[25]

Litigation privilege focuses on the purpose of the communication, unlike solicitor-client privilege. Therefore, it is not dependent upon the nature of the relationship between the sender and recipient. While it typically protects communications between a lawyer and third persons (or between a lawyer and a client), litigation privilege also protects documents prepared by a litigant, even in the absence of a lawyer, if the above-mentioned criteria are met.[26] It also protects communications with employees of a litigant, as well as statements by and communications with potential witnesses.

In addition to protecting communications between counsel and client, communications with or from third parties are immune from disclosure, if they are made to inform the solicitor regarding matters in issue in the litigation. The

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[24] Sopinka, supra fn. 2, at p. 745

[25] *Regional Municipality of Ottawa-Carleton v. Consumers' Gas Co. Ltd. et al.* (1990), 74 D.L.R. (4th) 742 (Ont. Div. Ct.) at p. 748 ["*Ottawa-Carleton*"];
see also *Ocean Falls Corp. v. Worthington (Canada) Inc.* (1985), 69 B.C.L.R. 124 (QL) at para. 7

[26] *Blank*, supra fn. 4, at para. 32;
See also: *Alberta (Treasury Branches) v. Ghermezian* (1999), 242 A.R. 326, 1999 ABQB 407 at para. 17.

privilege recognizes that in order to fully understand and prepare a case for trial, a lawyer will have to communicate with persons other than the client, and these communications should be protected from disclosure. Litigation privilege applies to all third party communications, if they are made in confidence and for the purpose of preparing for trial.

Litigation privilege is not a substantive right like solicitor-client privilege. It is subject to both legislative and judicial limitations, and "in recent years, [it has had] to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process"[27]. In his reasons in *Chrusz*, Carthy J.A. analyzed the rationale for litigation privilege. He concluded:

> there is nothing sacrosanct about this form of privilege. It is not rooted, as is solicitor-client privilege, in the necessity of confidentiality in a relationship. It is a practicable means of assuring counsel what Sharpe calls a "zone of privacy" and what is termed in the United States, protection of the solicitor's work product: …[28]

The modern trend, he noted, is towards more full and complete discovery. Changes to the Rules and the judiciary's liberal interpretation of the Rules have narrowed the scope of litigation privilege. It remains "the area of privacy left to a solicitor after the current demands of discoverability have been met."[29]

For example, there is a competing public interest in the promotion of the administration of justice through avoiding "trial by ambush". This is objective is met through the well known rule of requiring that all relevant evidence be produced and available for trial. This policy advocates early disclosure of all facts relevant to the litigation, on the premise that full access to all the facts on both sides of a dispute will facilitate an early and just resolution of the litigation. This objective can be encumbered by claims of litigation privilege. Hence, the discovery provisions of the *Rules of Civil Procedure* have placed limits on the extent to which litigation privilege may be claimed over certain communications.

For example, Rule 31.06(3) codifies the circumstances in which an expert's opinion, prepared in anticipation of litigation, loses privilege. A party must disclose the "findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that relate to a matter in issue in the action and the expert's name and address", unless the expert was retained solely for the purpose of the litigation, and the party undertakes not to call the expert as a witness at trial. In the absence of Rule 31.06(3), the findings, opinions and conclusions of the expert would remain privileged until such time as a decision was made to waive the privilege by producing a report in anticipation of calling the expert at trial.

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[27] *Blank*, supra fn. 4, at para. 61
[28] *Chrusz*, supra fn. 13, per Carthy J.A, at para. 24
[29] *ibid*, at para. 25

Rule 31.06(3) applies to all experts. If they are to be witnesses at trial, then their findings, opinions and conclusions must be disclosed. However, if the expert is not retained to testify but rather to assist counsel in understanding the client's case, then the communications may be subject to solicitor-client privilege as discussed, above.

Another incursion against the litigation privilege "zone of privacy" arises from Rules 31.06(2) and 76.04(1) which oblige a party to disclose the names and addresses of persons who might reasonably be expected to have knowledge of the matters in issue. Courts have extended the scope of Rule 31.06(2) to include a summary of the potential witnesses' evidence, although any written witness statement, if obtained for the dominant purpose of litigation, remains privileged.[30] This judge-made law is a clear encroachment upon the scope of litigation privilege, made with the intent of furthering the policy objective of full pre-trial discovery of all relevant facts.

A final important aspect of both litigation and solicitor-client privilege is that:

> they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise the party would be bound to give discovery of them.[31]

Thus, facts and documents are not immune from disclosure simply because they have been communicated by a client or expert to the solicitor. If the documents are relevant to the case, and must be proved at trial, they must be disclosed.

Settlement Privilege

Documents that are created for the intended purpose of reconciling or settling litigation are protected by settlement privilege.[32] The purpose behind settlement privilege is to encourage parties to engage in frank and open discussions in order to resolve their disputes without recourse to the courts.[33] Underlying this is the presumption that, without settlement privilege, few parties would engage in

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[30] For example: *Tax Time Services Ltd. v. National Trust Co.* (1991), 3 O.R. (3d) 44 (Gen. Div.), and *Dionisopolous v. Provias* (1990), 71 O.R. (2d) 547, 45 C.P.C. (2d) 116 (H.C.)

[31] *Susan Hosiery Ltd.,* supra, fn. 12

[32] *York (County) v. Toronto Gravel Road & Concrete Co.* (1882), 3 O.R. 584 at para. 21 (Ont. H.C.J.) aff'd without reference to this point (1885), 11 O.A.R. 764 (Ont. C.A.), aff'd (1885) 12 S.C.R. 517;
Pirie v. Wyld (1886), 11 O.R. 422 (Ont. C.A.).

[33] *Kelvin Energy Ltd. v. Lee* [1992] 3 S.C.R. 235, at para. 48.

settlement negotiations for fear that any concession made in the negotiations would be used against them if the negotiations failed.

The privilege belongs to both parties to the negotiations, and cannot be waived unilaterally.

The conditions that must be met in order for settlement privilege to apply are as follows:

1. *A litigious dispute must be in existence or within contemplation* (although a proceeding need not have already commenced);

2. *The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed*. The fact that a document is marked "without prejudice" is evidence of this intention, although it is not conclusive. Conversely, the absence of a "without prejudice" marking on a document does not mean that this intention did not exist – it may still be inferred from the circumstances; and

3. *The purpose of the communication must be to attempt to effect a settlement*.

The final element of the test is the crux of the inquiry. When considering a document and its contents, the question is whether the document was created for the purpose of attempting to resolve the dispute, regardless of whether it is marked "without prejudice".[34] While there has been some debate in the case law about whether a document must contain an actual settlement offer in order for settlement privilege to apply, this should not be the overarching consideration. Privilege should attach so long as the communication is "part of a correspondence which the parties intend will reasonably lead to a compromise or settlement of the dispute."[35]

Unlike litigation privilege, settlement privilege does not end after the conclusion of the litigation.[36] However, if a the existence or enforceability of a settlement agreement becomes the focus of a dispute, the privilege will not apply, and the documents will be producible as they are relevant to the issue before the court.

An interesting off-shoot of settlement privilege arises in the context of mediations. In *Rudd v. Trossacs Investments Inc.,*[37] the Divisional Court enforced Rule 24.1.1.4, and held that the mediator could not be compelled as a witness in respect of a dispute that arose regarding the settlement reached in the mediation

[34] Sopinka, supra fn. 2, at para. 14.322-14.327
[35] *ibid*., at para. 14.328-14.330.
[36] *Ontario (Liquor Control Board) v. Magnotta Winery Corp.,* [2009] O.J. No. 2980 (Div. Ct.),at para. 37
[37] *Rudd v. Trossacs Investments Inc.* (2006), 79 O.R. (3d) 687 (Div. Ct.)

session. The public interest in maintaining the confidentiality of mediation trumped the value of compelling the mediator to testify.

Case-by-case Privilege

If a communication or document does not fall within one of the class privileges discussed above, the party claiming privilege must demonstrate that the communication is nonetheless privileged and should remain confidential based on Wigmore's four criteria:

1. The communications must originate in a confidence that they will not be disclosed;

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[38]

Case-by-case privilege is commonly sought with respect to communications with journalists, accountants, physicians, social workers, religious leaders, among others. Generally, the courts have resisted these claims of privilege, mostly because the expansion of privilege results in the loss of valued evidence. The Supreme Court of Canada has made it clear that creation of new classes privileges will be rare.[39]

Loss or Waiver of Privilege

While the right to assert a privilege applies in any of the situations discussed above, the privilege, even solicitor-client privilege, may be lost or waived. Privilege can be expressly waived by the person who holds the right, or it may be deemed to have been waived in situations where the individual relies upon or puts in issue the privileged information.[40] Given the court's "zealous protection" of the solicitor-client privilege, waiver of this privilege will not be as easily

[38] *Slavutych v. Baker,* [1976] 1 S.C.R. 254, [1976] S.C.J. No. 29.
[39] David Paciocco and Lee Stuesser, *The Law of Evidence* (Ontario: Irwin Law, 1996) at 144.
[40] J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8, 3d ed., rev. by J.T. McNaughton, at s. 2327;
Podrebarac and Bida, *Keeping Secrets and Protecting Confidential Documents and Information in Litigation,* (2010) 37 Adv. Q., p. 216

established as waiver of other classes of privilege, except in situations where there has been an intentional disclosure to a third party.[41]

Express waiver occurs where the client voluntarily and intentionally discloses confidential communications. Implied waiver will be found if, on an objective consideration of the client's conduct, the court concludes that the client has demonstrated an intention to waive privilege. The court will also take into consideration the fairness to each party and consistency of the conduct with the party's intention in cases of implied waiver.[42] Hence, not every disclosure will result in a waiver of privilege. For example, if the disclosure to a third party is made in confidence, for the purposes of preparing a case for trial, then the disclosure will fall within the zone of privacy created by litigation privilege, and the privilege will not be deemed to have been waived.

(a) Voluntary/Express Waiver

Waiver clearly occurs if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of the privileged communication.[43] This arises by such acts as reading privileged communications into the record,[44] referring to them in Schedule A to an affidavit of documents[45], testifying about those communications at trial[46] or during discovery.[47] If the communication is discussed during cross-examination, waiver will occur unless it can be shown that the witness was misled or unclear about what was being asked.[48] However, waiver is unlikely to be found in situations where the client has requested that another person, such as a relative or friend, attend with them at meetings with counsel, if the purpose of their attendance is to assist in or facilitate the solicitor-client relationship, and the confidentiality of the communications is understood by all present[49].

If privilege is waived, then production of *all* documents relating to the communications will be ordered.[50]

(b) Limited Waiver

A party may voluntarily waive privilege on a limited basis relating to a defined subject matter. Such limited waiver is permissible, unless the selective disclosure would mislead the court or create an unfair advantage.[51]

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[41] *Guelph (City) v. Super Blue Box Recycling Corp.*, [2004] O.J. No. 4468 (QL) (S.C.J.)
[42] *Chrusz,* supra fn. 13, at para. 45, 58
[43] Sopinka, supra, fn. 2, at para. 14.122.
[44] *Frind v. Sheppard* [1940] O.W.N. 135 (Ont. Master).
[45] *Re Briamore Manufacturing Ltd.*, [1986] 1 W.L.R. 1429.
[46] *Smith v. Smith*, [1958] O.W.N. 135 (Ont. H.C.J.).
[47] Sopinka, supra, fn. 2, at para. 14.124.
[48] Sopinka*,* supra, fn. 2, at para. 14.124.
[49] *Hannis v. Tompkins,* [2001] O.J. No. 2600 (S.C.J.)
[50] Sopinka*,* supra, fn. 2, at para. 14.122.
[51] Sopinka*,* supra, fn. 2, at para. 14.123.

For example, in *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, the company's auditors attended a meeting of the audit committee. In-house counsel provided a summary of the legal advice given concerning the company's disclosure obligations relating to a senior officer's fraud. The Divisional Court found that privilege over the legal opinions provided to the auditors was waived but only for a the limited purpose of enabling the auditors to discharge their professional and statutory duties, and not for any wider purpose.[52]

(c) Waiver by Implication (Deemed Waiver)

In some cases, waiver may be deemed to have occurred even absent any intention to do so. Usually, this is found when the court concludes that fairness between the parties requires disclosure because the party has put their state of mind in issue, and the receipt of privileged information helped them form that state of mind.

In *Lands v. Kaufman*, the plaintiff made admissions about solicitor-client communications in the statement of claim. The defendants relied on these admissions in their defence. When the plaintiff's solicitor brought a motion to withdraw the admissions based on privilege, the court found that fairness demanded that the defendants were entitled to disclosure, especially since discoveries were completed based on the original pleadings.[53]

When a party puts his/her "state of mind" in issue in the pleadings or during the proceeding, and that state of mind was informed by legal advice, solicitor-client privilege will be deemed to have been waived. When a party relies on legal advice, he/she cannot in fairness be permitted to use privilege to prevent the other party from exploring its validity.[54] However, simply referring to legal advice may not constitute waiver; the legal advice must underlie the state of mind pleaded in the claim or defence in order to put it in issue.[55]

(d) Waiver by Inadvertent Disclosure

Sometimes disclosure of privileged communications may be entirely inadvertent and without any intention of waiver, express or implied. This can occur during the trial and discovery, or in pleadings and affidavits. With the prevalence of electronic discovery, inadvertent disclosure is likely to become an increasing occurrence and problem.[56]

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[52] (2005), 77 O.R. (3d) 209 at para. 61;
Sopinka, supra, fn. 2, at para. 14.126
[53] (1991), 1 C.P.C. (3d) 234, [1991] O.J. No. 1658 (Ont. Gen. Div.).
[54] *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd*. (1983), 35 C.P.C. 146 at para. 6 (B.C.S.C.).
[55] Sopinka, supra fn. 2, at paras. 14.130-133
[56] Sopinka, supra fn. 2, at para. 14.152.

Traditionally the common law held that once disclosure occurred, even if completely inadvertent, the privilege was lost and the communicated was admissible.[57] The courts have long since retreated from such a hard-line approach. Inadvertent disclosure does not automatically result in waiver of privilege.[58]

Whether or not privilege has been waived through inadvertent disclosure will depend on the circumstances. The court must consider a number of factors, including:

- the way in which the documents came to be released and whether the error was in fact inadvertent;
- the timing of the discovery of the disclosure;
- whether an immediate attempt was made to retrieve the documents after the disclosure was discovered;
- the number and nature of the third parties who have seen the documents;
- whether preservation of the privilege in the circumstances would cause unfairness to the receiving party; and
- the impact on the fairness of the process of the court.[59]

This is a fact-driven analysis. In some circumstances the privileged information may not have been fully released, or may have been released but not opened and read, militating against waiver. In other circumstances, the disclosure may have been the result of negligence and carelessness on the party claiming privilege, tipping the balance in favour of admission. In every case, the court must weight the relevant factors within the context of that case; no hard rule can be established.[60] However, the predominant consideration will be the intention of the privilege holder, as manifested through their own conduct. Accordingly, it is imperative that steps be taken promptly to retrieve any privileged documents as soon as the error is discovered, to avoid if possible, the argument that the privilege has been waived, and to limit the extent of dissemination to third parties.

Steps to Correct Disclosure

Where a party becomes concerned that privileged documents have been disclosed, the authorities set out specific steps that party should take. “An

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[57] *Calcraft v. Guest*, [1898] 1 Q.B. 759 (C.A.)
[58] *Nova Growth Corp. v. Kepinski* [2001] O.J. No. 5993 at paras. 22, 25;
Super Blue Box Recycling Corp., supra, fn. 41
Royal Bank v. Lee (1992), 9 C.P.C. (3d) 199 at 203-204 (Alta. C.A.);
Tilley v. Hails No. 2 [1993] O.J. No. 333 at para. 15 (Gen. Div.).
[59] *Airst v. Airst* (1998) 37 O.R. (3d) 654 at para. 18;
Chan v. Dynasty Executive Suites Ltd., 30 C.P.C. (6th) 270 at para. 31 (Ont. S.C.J.).
[60] *Airst,* supra, fn. 59, at para. 19.

immediate, and strongly worded demand for the return of specific documents" is the expected response.[61]

Courts have found that where there is knowledge and then silence on the part of the person claiming privilege this may amount to an implied waiver.[62] If a significant amount of time passes and the party does not address the inadvertent disclosure, waiver may result.

Conversely, when counsel recognizes that it has received documents to which privilege may be claimed, the court expects counsel to act accordingly. Counsel should stop reading the documents and inform the opposing party what documents it has received and determine if this production indicates waiver of privilege.[63]

Where the contents of the communication have been disclosed, the firm exposed to the communications should attempt to minimize the prejudice. For example, by isolating the litigation team that reviewed the privileged documents and taking them off the file.[64]

Where privilege is lost through pleadings, the courts may allow parties to remedy this by amending the pleading and withdrawing the reference and reliance to the communication.[65] Such disclosure is similar to disclosure in an affidavit of documents or a list for production. So long as the contents of the communication have not been disclosed, the communication is capable of withdrawal.

Removing Counsel from the Record:

If the court finds that privilege over inadvertently disclosed documents must be reinstated, the court may consider removal of counsel from the record given their unfair knowledge of privileged communications. This remedy is considered when counsel has had the opportunity to review the privileged documents for a considerable amount of time.

It is a cornerstone of our legal system that a litigant should not be deprived of the counsel of his/her choice of counsel without good cause. This principle must be balanced against the need to maintain the high standards and integrity of our legal system. Therefore, only in the most serious cases where continued representation by counsel would threaten the administration of justice will a court order the removal of a party's chosen counsel.[66]

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[61] *Earth Energy Utility Corp. v. Maxwell* [2008] O.J. No. 2800 at para. 31 (Ont. Sup.Ct).
[62] *Chapelstone Developments Inc. v. Canada* (2004) 277 N.B.R. (2d) 350 at para. 55 (N.B.C.A.).
[63] *Nova Growth, supra* at para. 29; *Antel (c.o.b DPA holdings) v. NCC Financial Corp* (2009) BCSC 479 at para. 54.
[64] *Chan,* supra, fn. 59, at para. 94.
[65] *Pet Supplies (USA) Inc. v. Pivotal Partners Inc.* [2008] B.C.J. No. 2376 at para. 22.
[66] *MacDonald Estate v. Martin* (1990), 77 D.L.R. (4th) 249 at para.15 (S.C.C.);
Chan, supra, fn. 59, at para. 93.

It follows that a court must exercise the "highest level of restraint" before interfering with a party's right to counsel of its choice. Removal of counsel is therefore an extreme equitable remedy that should be exercised only in exceptional circumstances.[67]

The court developed a two-part test to apply in situations where there is inadvertent disclosure of privileged documents and a request for removal of the receiving firm as solicitors of record.

According to *MacDonald Estate v. Martin*, the two questions the court must ask before disqualifying a law firm are:

1. Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?, and

2. Is there a risk that it will be used to prejudice the client?[68]

In *Celanese Canada Inc. v. Murray Demolition Corp*, the court considered six factors in answering the above questions:

1) How the document came into the possession of counsel;

2) What counsel did upon recognition that the document was potentially subject to solicitor-client privilege;

3) The extent of the review made of the privileged documents;

4) The contents of the solicitor-client communications and the degree to which they are prejudicial;

5) The stage of the litigation; and

6) The potential effectiveness of a fire-wall or other precautionary steps to avoid mischief.[69]

The court interpreted "prejudice" in this test to mean detriment.[70]

In cases where counsel does not follow the above procedure the court often removes the firm as solicitors of record. The court granted this remedy in *Chan v. Dynasty Executive Suites Ltd.* In that case privileged documents were included

[67] *377477 Ontario Ltd. v. Saadat*, [2005] O.J. No. 340 at para. 48 (Ont. S.C.J.);
Lautec Properties Inc. v. Barzel Windsor (1984) Inc., [2002] O.J. No. 4068 at para. 10, 16 (S.C.J.)
Zawadzki v. Matthews Group Ltd., [1998] O.J. No. 43 at paras. 6-7 (Gen. Div.).
[68] *MacDonald, supra* at para. 45.
[69] *Celanese Canada Inc. v. Murray Demolition Corp.* (2006) 269 D.L.R. (4th) 193 at para. 59;
Canada Post Corp. v. Euclide Cormier Plumbing and Heating Inc. (2008) NBCA 54 at para. 60.
[70] *Chan, supra* at para. 83.

inadvertently in Schedule "A" instead of "B" of the Affidavit of Documents. Three months later counsel realized the mistake; immediately informed the receiving party and requested return of the documents. These requests were made continuously in writing for a year. The opposing counsel refused to return the documents; they claimed privilege was waived by the inadvertent disclosure.

The court found that privilege was not waived. The disclosure was a mistake and counsel acted to correct it accordingly. The court then applied the test from *MacDonald* and *Celanese* and found it satisfied. The entire litigation team read the privileged documents. Prejudice was inevitable. There was no other remedy to rectify the situation but removal as solicitors of record. Although the court recognized the significant costs associated with removal of counsel, it was the only option available to preserve the integrity of the justice system.[71]

Once a party acknowledges that privileged materials have been inadvertently disclosed it must act quickly. Courts consider the length of time it took for the applicant to make a request to remove a solicitor from the record. Delay in bringing a removal motion is relevant to the exercise of the equitable discretion. Where there is unexplained delay, the interests of the responding parties to a removal motion deserve consideration.[72]

In *Lautec Properties Inc. v. Barzel Windsor* the court acknowledges the significant prejudice by way of delay, particularly in circumstances where the alleged conflict was apparent for several years and not addressed.[73] The court did not grant the relief to remove a firm as solicitors of record in *Lautec* for a number of reasons, including the delay taken in bringing forward the motion.

Removal of counsel is a serious remedy. Its application will be highly dependent on the behaviour of the parties.

Conclusion

The concept of privilege and when it applies or when it is waived are complex issues that are regularly challenged in the courts. The right to claim privilege is the only exception to disclosure of relevant information in the litigation process. Accordingly, counsel should stay alive to the issue and should ensure that their clients fully understand the concept and their rights to privacy, and how those rights may be lost. Additionally, one should not simply accept a boilerplate Schedule B in an affidavit of documents, but seriously consider what documents are entitled to the claim of privilege, and if any situations exist that might give rise to opportunities to challenge the claim, and obtain production of otherwise privileged materials. Remember – even solicitor client privilege is not an absolute right, and it may be waived or lost.

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[71] *Chan, supra* at para. 98.
[72] *Lautec, supra* at paras. 10, 27; *R. v. Neil,* [2002] 3 S.C.R. 631 at para. 38 (S.C.C.); *Moffat v. Wetstein* (1996), 135 D.L.R. (4th) 298 at para. 124 (Ont.S.C.J.).
[73] *Lautec, supra* at para. 27.