Global Attorney-Client Privilege Guide - Canada

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| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# 01 - Discovery

## What disclosure/discovery is required in litigation?

Under the rules that govern civil procedure in most provinces and territories of Canada, during the initial stages of the litigation process, the parties must produce an affidavit of documents, which is a list of all documents relevant to a given proceeding that are or have been in a party's possession, control or power. The listing is contained in an affidavit made under oath or solemnly affirmed. Following the exchange of the parties' affidavit of documents, the listed non-privileged documents are exchanged, and each party will have an opportunity to conduct oral examinations in respect of them.

While the parties are generally not required to turn over privileged documents to one another, they are required to list in a schedule to their affidavit of documents the documents that are relevant to the proceeding but which are not being produced because of their privileged status. All documents for which privilege is claimed must be listed separately, setting out the nature and date of the document and other particulars sufficient to identify it. The grounds for claiming privilege must also be set out for each document. The purpose of this degree of description of the privileged documents is to enable the other parties to the litigation to test, if necessary, the claim of privilege. If one party claims privilege over a document and another party wishes to dispute that claim, a motion can be brought to the court to decide whether a claim of privilege may have been improperly made, and the court may order any of the following:

Cross-examination on the affidavit of documents

Service of a further and better or more specific affidavit of documents

Disclosure or production for inspection of the document, if it is not privileged

Inspection of the document to determine the document's relevance or the validity of the claim of privilege

The purpose of claiming privilege is to prevent the document from being used at trial. However, there are two circumstances in which a party may be able to use a document for which privilege has been claimed:

A party may, by written notice, abandon a claim for privilege by disclosing the document or producing it for inspection within 90 days before the start of the trial.

If the claim for privilege is not abandoned, the document may be used only to impeach (dispute, deny or contradict) the testimony of a witness or with leave (permission) of the court.

In a motion for leave of the court to use a privileged document, the court must grant leave on whatever terms and conditions are appropriate, including an adjournment, unless permitting the document to be used at trial would cause prejudice or unduly delay the trial.

While the above sets out the general law in Canada on the use of privileged documents in civil proceedings, every province and territory has its own civil procedure legislation, each with its own particularities. For the specific requirements in each of Canada's provinces and territories, reference must be made to the governing legislation in the relevant jurisdiction.

# 02 - Type of privilege

## Does the jurisdiction recognize the concept of privilege or another form of protection from disclosure of legal communications and documents prepared by or for lawyers?

Canadian common law recognizes the concept of privilege as a shield that protects against the mandatory disclosure of much of the communication that passes back and forth between a lawyer and their client. The privilege belongs to the client, not the lawyer, and can therefore be waived only by the client. In the province of Quebec, a civil law jurisdiction, solicitor-client privilege is referred to as "professional secrecy".

**Solicitor-client (or attorney-client) privilege** protects the direct communications – both oral and documentary – prepared by the lawyer or client and flowing between them in connection with the provision of legal advice. To be protected, the communication must be intended to be made in confidence, in the course of seeking or providing legal advice, and must be advice based upon the professional's expertise in law. Solicitor-client privilege is no longer considered to be a rule of evidence in Canada, but a substantive rule that has evolved into a fundamental civil and constitutional right. The privilege is not absolute, but it is as close to absolute as possible to ensure public confidence and retain relevance. It will yield only in certain clearly defined circumstances, including where an accused's innocence is at stake, where the communications at issue are criminal or have a view to facilitating the commission of a crime, where public safety requires protection, where a client puts their reliance on legal advice in issue, or where a client and lawyer are adversaries in litigation.

**Litigation privilege**, also called work product privilege, applies to communications between a lawyer and third parties or a client and third parties, or to communications generated by the lawyer or client for the dominant purpose of litigation when litigation is contemplated, anticipated or ongoing. Generally, it is information that counsel or persons under counsel's direction have prepared, gathered or annotated. As set out by the Supreme Court of Canada in *Blank v. Canada*, the purpose of the privilege, "[…] is to create a 'zone of privacy' in relation to pending or apprehended litigation" so that litigants can, "[…] prepare their contending positions in private, without adversarial interference and without fear of premature disclosure." The privilege is lost when litigation-privileged materials are tendered or relied upon in court.

# 03 - Scope of privilege

## Is attorney-client communication only privileged as long as it remains in the lawyer's possession, or is a copy held by the client also protected?

As the privilege belongs to the client and not the lawyer, copies of attorney-client communications possessed by the client are protected, so long as the communications were intended to be made in confidence, they were sought in the course of the client's attorney providing legal advice, and the advice was based on the attorney's expertise. The copy will be protected so long as the client has not previously waived their privilege.

As set out in *S&K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.*, waiver of privilege is normally established where it is shown that the client both:

Knows of the privilege attached to the communications

Voluntarily makes clear an intention to waive that privilege

In the event that privileged communications have been inadvertently released, a court will engage in an objective test to discern whether the client's conduct demonstrates an intention to waive privilege (e.g., the client participated or gave instructions specific to actions that led to the release of the privileged communications).

## Are in-house lawyers treated in the same way as external lawyers for determining privilege?

Solicitor-client privilege applies to communications with internal and external counsel. The difficult question arises when work done by in-house counsel straddles the line between business and legal advice; privilege will generally apply to the latter, but not the former. As set out by the Supreme Court of Canada in *Pritchard v. Ontario*, legal advice from in-house counsel may be subject to increased scrutiny:

"Owing to the nature of the work of in-house counsel, often having both legal and nonlegal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose"… "[However,] [i]f an in-house lawyer is conveying advice that would be characterized as privileged, the fact that he or she is 'in-house' does not remove the privilege, or change its nature."

## Does privilege extend to internal communications between in-house lawyers?

While in-house counsel may be subject to increased scrutiny, so long as the communications between the in-house lawyers meet the aforementioned test for privilege (i.e., the communications involved legal advice and not business advice, and the communications concern the in-house counsel's function as a lawyer), the privilege will extend to the communications.

## Are foreign lawyers recognized for the purposes of privilege?

The modern view in Canada is that solicitor-client communications are protected by privilege even where the solicitor providing the advice is not qualified to practice in the jurisdiction in which the advice was given. As set out by the Manitoba Court of Appeal in *Gower v. Tolko Manitoba Inc.*:

"So long as one of the parties to the communication is a lawyer, though perhaps not called to the bar of the jurisdiction in which the issue arises, [solicitor-client] privilege attaches. To hold otherwise would be to ignore the realities of the modern practice of law."

## Does privilege extend to nonlegal professionals who may from time to time advise on legal issues relating to their field, e.g., accountants or tax consultants advising on tax law?

Privilege may extend, in the right circumstances, to third parties who are performing functions that are central to the existence or operation of the lawyer-client relationship. These could include accountants or tax consultants advising on tax law, so long as they are performing their specialized duties in their areas of expertise, and are included in group communications and receive legal advice from legal counsel. The scope of this "deal team" privilege will depend on the facts of each case and is discussed in greater detail below.

However, attorney-client privilege will not extend to communications of nonlawyers in the provision of advice on legal issues related to their field if this advice falls outside of any existing attorney-client relationship.

In *Canada (National Revenue) v. Atlas Tube Canada ULC*, the Federal Court ruled that the Canada Revenue Agency (CRA) could compel a private corporation to disclose a tax due diligence report in the course of an audit. In its analysis, the court determined that the dominant purpose of the report was to inform a business decision and the effect of the report on informing legal advice was ancillary to the business decision. Further, the court found that the contents of the report were accounting opinions, not prepared for the purpose of obtaining legal advice on the structuring of the transaction. Therefore, the report was not protected by solicitor-client privilege.

Canadian courts have also recognized patent agent privilege. In a recent case, the Federal Court ruled that patent agent privilege does not include all communications involving patent strategy, patentability or infringement. To be privileged, the communication must relate to the protection of an invention.

# 04 - Sharing documents with third parties

## In what circumstances (if any) can a document be given to a third party without losing protection?

Privilege belongs to the client and can be waived only by the client through their informed consent. The client's compelled or unintended disclosure does not constitute waiver; only voluntary disclosure to a third party constitutes waiver. However, waiver can occur in the absence of an intention to waive, where fairness and consistency so require. Fairness only applies where the information sought to be disclosed is relevant to the issues in the proceeding.

The common-interest doctrine is an exception to the rule that disclosure of privileged information to a third party waives solicitor-client privilege. The exception applies where privileged information is confidentially shared among parties pursuing a common goal or seeking a common outcome. Legal opinions can be shared without loss or waiver of privilege, where such sharing of information facilitates the completion of a transaction because the parties are able to become informed of the respective legal opinions of others. Parties have been found to have a sufficient common interest where they "shared a united front against a common foe"; they wished to see the successful completion of a commercial transaction; and when a fiduciary duty has been found to exist between them.

# 05 - Investigations

## Are there any differences in how privilege operates in civil, criminal, regulatory or investigatory situations?

There are generally no differences as to how privilege will be applied in the criminal, civil, regulatory or investigatory context. However, courts or tribunals may take into account the context when determining whether certain exceptions apply. For example, in *Bone v. Person*, the Manitoba Court of Appeal held that where solicitor-client privilege was waived when defending criminal charges, privilege of the same communication was deemed to be waived for subsequent civil proceedings.

## Can notes of interviews with employees and other documents produced during investigations be covered by privilege?

Information and records that are created as a result of an internal investigation may be considered privileged and thus protected from disclosure. Both litigation privilege and solicitor-client privilege may apply to these types of documents. Litigation privilege, described above, may cover notes of interviews with employees and other documents produced during investigations. In order for the communication to be protected by litigation privilege, there must be current litigation or a reasonable contemplation of litigation and the dominant purpose of the communication must be for use in the current or contemplated litigation. Litigation need not be the only purpose for the communication; however, it must be the primary purpose. Litigation privilege is not limited to communications between solicitor and client, but can be asserted against third parties, such as third-party investigators with a duty of confidentiality. Where an investigation is preliminary, the documents or communications may not be considered privileged.

Recently, the Alberta Court of Appeal in *Alberta v. Suncor Energy Inc*. confirmed that the records of an internal investigation may be privileged, notwithstanding a statutory obligation to carry out an investigation and prepare a report. However, the Court of Appeal emphasized that a court must analyze the claim of privilege for each record, and cautioned against blanket claims of privilege for all documents created in the context of an investigation.

# 06 - Regulatory investigations

## Can governmental regulators require a privileged document to be provided to them?

Absent a specific and explicit statutory term, governmental regulators do not have a general power to insist that privileged documents be produced for the purposes of their investigations. The Supreme Court of Canada confirmed this principle in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*.

In *Canada v. Chambre des notaires du Quebec*, the Supreme Court of Canada upheld a lawyer's obligation to protect confidential client information by ruling various sections of the federal Income Tax Act unconstitutional. The section required that legal professionals, upon request from the CRA, provide the CRA with client documents for income tax purposes. The court stated that the sections were unconstitutional insofar as they applied to lawyers or notaries because they amounted to an unreasonable seizure in breach of section 8 of the Charter.

# 07 - Recent issues

## What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

**Advisory privilege**

A recent decision of the Federal Court of Appeal has clarified the law around deal or advisory privilege. This form of privilege extends to shared privileged communications exchanged during the course of due diligence with the purpose of furthering a proposed transaction. In *Minister of National Revenue v. Iggillis Holdings Inc.*, the Court overturned a controversial decision that had held that deal team or advisory privilege should not be recognized in Canada and which was influenced by a recent academic article and US jurisprudence.

The CRA, Canada's tax administration body, sought production of a memorandum that was shared between separately retained defense counsel. The memorandum had been prepared during the course of a commercial transaction and set out a strategy for completing the sale in such a way to obtain the most tax efficient basis for both parties. The Federal Court found that privilege over the document was lost when it was shared between the vendor and purchaser.

In a unanimous decision, the Federal Court of Appeal overturned the lower court's decision and confirmed that deal or advisory privilege is a legitimate legal doctrine in Canada and that it was not waived when the memorandum was shared. In affirming the notion of deal or advisory privilege, the Federal Court of Appeal acknowledged the policy rationale that underlies the doctrine — to serve legitimate business interests by facilitating efficient transactions. The Federal Court of Appeal rejected the lower court's suggestion that parties were using claims of deal privilege as a shield to protect abusive tax avoidance schemes. This appellate level decision represents a clear re-alignment with the established case law in Canada. The Supreme Court of Canada denied the CRA's application for leave to appeal.

**Settlement privilege**

The Supreme Court of Canada extended settlement privilege to Quebec's family mediation process in *Association de médiation familiale du Québec v. Bouvier*. In confirming that a rule of absolute confidentiality is not required in certain circumstances, the court applied its own precedent from *Union Carbide Canada Inc v. Bombardier Inc*. In *Union Carbide*, the court stated that the disclosure of protected communications will be sometimes necessary to confirm that a settlement has arisen from mediation. As a result, where necessary, courts can breach the presumed confidentiality of the family mediation process to adduce the presence or scope of an agreement between the participating parties.

**Public interest privilege**

In *Vancouver Airport Authority v. Commissioner of Competition*, the Federal Court of Appeal rejected the Commissioner of Competition's position that public interest privilege can be claimed as a class privilege. As a result, the Competition Bureau must now establish public interest privilege on a case-by-case basis.

# 08 - Authors

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