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Primer on Preserving Privilege in the Context of Litigation

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Overview

- Role of in-house counsel with respect to production obligations
- Privilege: a refresher
- Preservation of privilege
  - Labelling
  - Maintenance
  - Distribution
- Dealing with intermediaries
- Waiver & inadvertent disclosure
- Common interest privilege

Role of in-house counsel

- Manage the litigation on behalf of the company
- Set the strategy
- Provide advice to the business operations
- Instruct external counsel
- Ensure litigation is consistent with corporate priorities and objectives
- Manage the cost of both internal and external legal resources

Role of in-house counsel

Discovery obligations

- 31.02(1) Every document which relates to a matter in issue and is or has been in a party's possession or control, or that a party believes to be in a non-party's possession, custody or control must be disclosed

- 31.02(2) Every document which relates to a matter in issue in an action and which is in the possession or control of a party to the action, shall be produced for inspection if requested, as provided in this rule, unless privilege is claimed in respect of that document

Role of in-house counsel

Discovery obligations

Doucet v. Spielo Manufacturing Inc., 2006 NBQB 249

- Broad and liberal approach to a litigant's disclosure obligations
- Low threshold test for determining whether a document is relevant
- Wide latitude is permitted at the discovery stage: semblance of relevancy
- A corporation is affiliated with other corporations, Rule 31.11(21) imposes an obligation to disclose all documents which are in the possession and control of its affiliated corporation

Role of in-house counsel

Consider Litigation Hold Notices

- Preserve records when litigation is reasonably foreseeable
- Issue notice and reissue it periodically
  - Suspend destruction of data
  - Instruct employees to preserve and produce electronic files as requested
  - Communicate directly with “key” employees (critical custodians) identified as having relevant information
  - Make employees aware of the legal ramifications
  - Review your document retention policy
  - Ensure that all backups are identified and stored separately, even if this preservation would normally be a violation of the normal data retention policy

A refresher: privilege

Two most commonly claimed types of privilege:

1. Solicitor-client privilege
2. Litigation privilege

A refresher: privilege

Solicitor-client privilege

- Three necessary elements to claim solicitor-client privilege:
  - (1) Communication between solicitor and client
  - (2) Intended to be confidential as between the parties
  - (3) For the purposes of seeking or providing legal advice
- Once established, is considerably broad and all-encompassing
- Applies equally to in-house counsel when conveying legal advice
- Does not apply when giving business or policy advice
- Wide swath of individuals within the corporation can count as the "client" for the purposes of their communications with corporate counsel

Solosky v. The Queen, [1980] 1 S.C.R. 821

A refresher: privilege

Solicitor-client privilege

- Does not attach simply because the person in possession of the information is a lawyer
- Copying in-house counsel on certain documents does not automatically render them privileged
- Merely having a lawyer participate in the discussion is not enough to cloak the communication with solicitor-client privilege
- However, the privilege, when present, extends to all forms of communication including faxes, voicemails, emails, electronically-stored information

A refresher: privilege

Litigation privilege

- Litigation privilege is a temporary "zone of privacy" recognized as a matter of procedure in order to help a lawyer investigate a claim and gather evidence in preparation for litigation without having to disclose that information to the other side
- Gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation
- Litigation must be dominant purpose, not merely one of several purposes
- Focus is on the purpose for which the document was created, or came into existence, as distinct from the purpose for which it may have been collected (i.e. merely copying a pre-existing document for your lawyer's file as compared to preparation of a document for submission to the lawyer): ***Edgar v. Auld et al.***, 2000 CanLII 30188 (NBCA)

A refresher: privilege

Litigation 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
- When is litigation contemplated or anticipated?
  - Cannot be founded on a "suspicion of the possibility of litigation"
  - Litigation is sufficiently contemplated when something arises to give "reality to litigation"
  - Does not necessarily arise when an insurer is notified of a potential loss

Marco Maritimes Ltd. v Intact Insurance Co., 2012 NBQB 204

A recap: privilege

	Solicitor-client privilege	Litigation privilege
Purpose/Rationale:	To protect the *relationship*	To ensure the efficacy of the *adversarial process*
Applies to:	Only to confidential communications between the client and her solicitor	Communications of a non-confidential nature as between the solicitor and third parties
Exists when:	At any time a client seeks legal advice from her solicitor whether or not litigation is involved	Only in the context of litigation itself (whether ongoing or anticipated)
Duration:	Permanent (continues even after the death of the client)	Temporary (but may continue in related proceedings)

Preserving privilege: solicitor-client

- Focus on labelling, maintenance and storage
  - Treat communications to counsel for purpose of obtaining legal advice as confidential
  - Store communications in a confidential fashion
  - Mark documents “Confidential—Prepared for Submission to Counsel for Legal Advice” or “Confidential – Prepared for the Purpose of Providing Legal Advice”
  - Communications between employees for the purpose of gathering information to submit to counsel should also be marked “Confidential—Prepared for Submission to Counsel for Legal Advice”

Preserving privilege: solicitor-client

- Consider how and when to distribute communications containing legal advice
  - Avoid disseminating legal opinions or communications widely within the company
  - Communications widely disseminated within the company without indication that they constitute legal advice and are confidential may lose privilege: ***Toronto Dominion Bank v. Leigh Instruments Ltd.*** (1997), 32 O.R. (3d) 575 (Ont. Sup. Ct.)
  - When disclosing privileged communications to a third party, document the intention not to waive privilege

Preserving privilege: litigation

- Keep detailed notes of why you are creating a certain document or undertaking a certain activity - documenting exactly why you are recording certain information could help secure litigation privilege
- Make note of that fact on any documents created during the investigation stage if there is a possibility of litigation arising
- Record if any potentially adverse party mentions the word “litigation” or alludes to a potential claim in any way
- Have counsel (rather than employees) gather information from third parties

Preserving privilege: litigation

- When making notes regarding possible litigation, always state why litigation seems like a reasonable prospect
- Securing litigation privilege is about substance over form; simply stating “This document is being created for the purpose of being put before a lawyer” may not be enough to convince a court that actual litigation was being contemplated
- See ***Brown v. Ross***, 2011 NBQB 313
  - “As I see it Wawanesa is trying to camouflage or mask its ordinary investigation of an accident as all being protected by some broad litigation privilege...” (para 9)

Privilege and intermediaries

- Solicitor-client privilege can arise if a third party, as agent of the client, carries out an investigation at the direction of the client's lawyer and as a result produces documents to assist the latter in advising the client

Lamey (Litigation Guardian of) v. Rice (2000), 227 N.B.R. (2d) 295 (NBCA)

> "In [sic] seems clear that a solicitor-client privilege arises if, as in the present case, an adjuster, as agent of the client, carries out an investigation at the direction of the client's lawyer and as a result, produces documents to assist the latter in advising the client. There is not one iota of evidence to support the conclusion that Mr. Correia's retainer is other than legitimate. If there was evidence that Mr. Correia was no more than a conduit for the documents, solicitor-client privilege would not arise" (para 12).

Privilege and intermediaries

Province of New Brunswick v Enbridge Gas New Brunswick Limited Partnership et al, 2016 NBCA 17

> "The uncontradicted evidence reveals Elenchus and KPMG were intermediaries, providing advice and counsel at the direction of legal counsel on seminal questions relating to the development of natural gas policies in the Province of New Brunswick. This expert opinion advice became part and parcel of the legal opinions generated by outsourced counsel to the Province on the same issues under consideration by Cabinet. Doherty J.A., in *Chrusz*, states:
>
> […] 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. [para. 120]" (para 34)

Waiver & inadvertent disclosure

Inadvertent disclosure does not automatically result in waiver

Chapelstone Developments Inc., Action Motors Ltd. and Hamilton v. Her Majesty the Queen in Right of Canada, 2004 NBCA 96

> "In summary, the general rule is that the right to claim privilege may be waived, either expressly or by implication. However, inadvertent disclosure of privileged information does not automatically result in a loss of privilege. More is required before the privileged communication will be admissible on the ground of an implied waiver. For example, knowledge and silence on the part of the person claiming the privilege and reliance on the part of the person in receipt of the privileged information that was inadvertently disclosed may lead to the legal conclusion that there was an implied waiver. In the end, it is a matter of case-by-case judgment whether the claim of privilege was lost through inadvertent disclosure." (para 55)

Waiver & inadvertent disclosure

- Whether privilege has been waived by inadvertent disclosure is a **fact-specific inquiry**, which may include consideration of the following factors:
  - The way in which the documents came to be released
  - Whether there was a prompt attempt to retrieve the documents after the disclosure was discovered
  - The timing of the discovery of the disclosure
  - The timing of the application
  - The number and nature of the third parties who have become aware of the documents
  - Whether maintenance of the privilege will create an actual or perceived unfairness to the opposing party
  - The impact on the fairness, both actual or perceived, of the processes of the court

R v Ward, 2016 ONCA 568

Waiver & inadvertent disclosure

- Since waiver by disclosure must be deliberate and knowing, courts will generally protect inadvertent disclosures
- Who has authority to waive?
  - ***Nova Scotia Dept Transportation v Peach***, 2011 NSCA 27, author of the email had authority to waive privilege because he was a management level employee, he was acting within his sphere of authority and within his territorial jurisdiction when he communicated with Peach, and he evinced an intention to waive privilege

Inadvertent disclosure

The perils of receiving inadvertent disclosure

- ***National Bank Financial Ltd. v. Daniel Potter***, 2005 NSSC 113
  - "Once Messrs. Parish, Awad and Wisenfeld came into possession of privileged information there were two issues. First what should they have done. In that regard they failed. Second how to limit or undo the prejudice if that was possible. Their state of knowledge is only relevant to the issue of whether there was an abuse of process warranting a stay of the NBFL claims. If I believed NBFL went after documents knowing they were privileged the argument in favour of a stay may be more convincing. In this case I am satisfied the difficulty arose from the fact Mr. Awad simply did not understand the nature and extent of privilege and he charged ahead based on lack of understanding. None of the counsel seemed to have appreciated that **it was not for them to decide if privilege had been waived** by the holder or by the operation of law…" (para 110)
- If handled inappropriately, may result in a stay of proceedings as a punitive measure, or, as in ***National Bank***, removal of counsel from file

Inadvertent disclosure

“Clawback Agreement”

- Provisions for notice of inadvertent disclosure by producing party within a defined time period, following which documents will be returned or destroyed
- Provisions allowing the receiving party to dispute the claimed privilege by motion
- Provisions for notice of inadvertent disclosure by receiving party
- Provisions allowing the producing party to assert the claim of privilege

Common interest exception

- If the parties have a joint interest in the subject matter of the communication at the time it comes into existence, the common interest exception to waiver is established
- The communication is still privileged with respect to the outside world, but not as between the parties
- There is an important expectation that although there was a partial disclosure to a third party, the communication shall remain confidential to the outside world

Common interest exception

Solicitor-client privilege extends to a legal opinion disclosed to a person other than a client who has a sufficient "common interest"

Iggillis Holdings Inc v Canada (National Revenue), 2018 FCA 51

> "Based on the decisions of the courts in Alberta and British Columbia, solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions." (para 41)

Common interest exception

Common Interest Privilege Agreements

- A summary of facts establishing common interest
- An assertion of common interest
- A broad definition of common interest materials
- A statement that there is no obligation to share materials
- An acknowledgement that sharing materials does not amount to waiver of privilege
- An obligation to surrender shared materials on termination
- A statement that confidentiality and privilege survive termination
- A statement that no solicitor client relationship is created by virtue of the common interest

Best practices: investigations

- When in-house counsel is conducting an investigation, consider a “retainer letter” or memorandum of instruction with statements to the effect that:
  - The lawyer is conducting an investigation as counsel for the purpose of providing legal advice
  - All information given to the investigator will be held in strict confidence and revealed only on a need-to-know basis
  - The investigator will prepare a report stating his or her findings as well as a conclusion and analysis of the legal issues identified, which will be maintained in confidence and distributed only as authorized

Best practices: opinions

- Where a lawyer has both legal and policy/business capacities, ensure that documents providing legal advice are signed with reference only to his or her legal capacity
- Frame the discussion in terms of a legal issue rather than a policy/business issue
- A memo which begins “The legal department has been asked to assess the legal risks of sending an acknowledgement via email” is preferable to “This memo sets out the department's policies on email acceptance of contracts”
- Use legal department letterhead rather than general letterhead

A cautionary note

- Communications with in-house counsel are privileged in some E.U. jurisdictions, such as England, Ireland, the Netherlands and Spain. They are not privileged in other E.U. states, including Austria, Estonia, France, Finland and Italy
- ***Akzo Nobel Chemicals and Akcros Chemicals v Commission*** (2010, EU Dt. Ct.)
  - "…an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence" (para 47)

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