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Avoiding Pitfalls in Waiver of Privilege

CHAIR

Adil Abdulla, Sotos Class Actions

SPEAKERS

Maureen Littlejohn, Davies Ward Phillips & Vineberg LLP

Cynthia Spry, Babin Bessner Spry LLP

Andrew Max, Addario Law Group LLP

AGENDA

1. Introduction to Privilege & Waiver
2. Fact Patterns

1. Introduction to Privilege & Waiver

What is Privilege?

- Privilege is an exception to the general rule that everything relevant to the issues in litigation must be produced.
- If a document is privileged, it is immune from disclosure unless:
  - Certain narrow exceptions apply (outside the scope of today's discussion); or
  - Privilege is waived.
- Privilege is not the same as confidentiality. The fact that certain communications are made with an expectation that they will be confidential does not mean that they will be privileged.
- In the following slides, we summarize the three most relevant types of privilege: solicitor-client privilege, litigation privilege, and settlement privilege.

Solicitor-Client Privilege

- **Purpose**: Facilitates a relationship between solicitor and client
- **Duration**: Permanent – it even survives the death of the client or termination of the solicitor-client relationship (but subject to waiver)
- **Test**:
  1. A communication (oral or written) between a solicitor and a client
  2. That occurs for the purpose of seeking or giving legal advice
  3. That is made in confidence and is intended to be confidential by the parties.

Most waiver issues arise with respect to solicitor-client privilege

Litigation Privilege

- **Purpose**: Creates a "zone of privacy" in contentious proceedings so that parties are free to prepare their cases without interference by opponents
- **Duration**: Only until the end of the litigation that gave rise to the privilege and any related litigation (but subject to waiver)
- **Test**:
  1. A communication or any other document
  2. That was created for the dominant purpose
  3. Of preparing for existing or reasonably anticipated litigation

Settlement Privilege

- **Purpose**: Promotes settlement by protecting efforts to settle, even if they do not succeed
- **Duration**: Permanent, even if no settlement is reached (but subject to **mutual** waiver and waiver in litigation to enforce settlement terms)
- **Test**:
  1. A communication or any other document
  2. That was made for the purpose of achieving a settlement
  3. In the expectation that they would remain confidential should negotiations break down
  4. At a time when litigation had been commenced or was within the parties' contemplation

Waiver of Privilege

- Waiver = loss of privilege
- Privilege that has been waived cannot be reasserted (at least not in the same proceeding). Litigants cannot "stuff the toothpaste back into the tube": *Siegerist v Siegerist*, 2022 BCSC 1427 at para 38.
- Waiver can be express or implied

Who Can Waive Privilege?

- **General Rules**: Privilege belongs to the client, so only the client can waive privilege.
  - If a document is released by someone without authorization from the client, privilege is usually not waived.
  - The client's lawyer is usually assumed to be acting with authorization.
- **Special Rules for Corporations**: Those with the authority to bind the corporation can usually waive privilege. Former directors and officers usually cannot retroactively waive privilege over documents they created while in their positions.
- **Special Rule for Settlement Privilege**: Settlement privilege belongs to both parties, so it cannot be unilaterally waived by one party, except to prevent double recovery and where one party brings litigation to enforce settlement terms.

Express Waiver

- Express waiver occurs where the holder of the privilege:
  - Knows that privilege exists; and
  - Voluntarily evinces an intention to waive it.
- Express waiver has been held to occur where the holder of the privilege:
  - Disclosed the substance of privileged advice;
  - Disclosed or produced privileged communications; or
  - Called counsel to appear as a witness to testify regarding the advice they gave.

Implied Waiver

- Waiver can be implied where:
  - Where "**fairness** and **consistency** so require": *S & K Processors Ltd v Campbell Ave Herring Producers Ltd*, 1983 CanLII 407 (BC SC) at para 6;
  - Where a party "takes a position in relation to privileged materials that is inconsistent with maintaining the privilege … for example, **selectively disclosing** part of a privileged document … but withholding the remainder of the document": *United States v Meng*, 2020 BCSC 1461 at para 37; or
  - Where a party puts their state of mind or their **legal advice in issue**, meaning that they "voluntarily inject" privileged material into the litigation, such as by pleading that they relied on advice: *Long v Red Branch Investments Limited*, 2022 BCCA 293 at para 26

Inadvertent Disclosure

- True inadvertent disclosure generally does not result in waiver.
- To assess whether disclosure was inadvertent, the court considers three factors:
  - Whether "the error was in fact inadvertent and thus excusable";
  - Whether "an immediate attempt was made to retrieve the documents"; and
  - Whether "the preservation of privilege in the circumstances would cause unfairness to the receiving party": *Spiral Aviation Training Co, LLC v Canada (Attorney General)*, 2009 CanLII 51252 (Ont Sup Ct) at para 9.
- Thus, even if disclosure was not intentional, if it rises to the level of **recklessness** or if the party is found to have **acquiesced**, privilege may still be waived.

Limited Waiver

- Historically, once a party waived privilege against anyone, it was waived against the world.
- Now, there are exceptions allowing for waiver in one proceeding and for a particular limited purpose, but not for other proceedings or other purposes. Limited waiver has occurred where:
  - Disclosure was **required by statute** (something that is not voluntary), such as giving documents to auditors to comply with section 153 of the *Business Corporations Act*, RSO 1990, c B.16: *Philip Services Corp v Ontario Securities Commission*, 2005 CanLII 30328 (Ont Div Ct); or
  - Disclosure was made **to the police** for a limited purpose like assisting with a criminal investigation: *Rekken v Health Region #1*, 2012 SKQB 248 at paras 20-22.

Other Anti-Waiver Doctrines

- Since solicitor-client privilege is of fundamental importance to the administration if justice, courts developed other doctrines to limit waiver. For example, privilege may not occur if:
  - Disclosure was made to a third party serving as "a **channel of communication** between the client and solicitor": *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 47;
  - Disclosure was made to a third party with a **statutory right** to the information, described above in connection with limited waiver; or
  - Disclosure was made to someone with a **common interest** in the relevant litigation or (possibly) commercial transaction.

Effect of Refusal to Waive Privilege

- Courts have drawn adverse inferences from a party's failure to waive privilege:
  - "Any possible doubt as to a finding of fraud … is overcome by his refusal to waive solicitor-client privilege with respect to his lawyer's file in this action": *Gauthier v Gauthier*, 2023 MBKB 14 at para 20
  - "it is appropriate for me to draw an adverse inference. I am left to conclude that this failure to … waive solicitor-client privilege is 'an implied admission that the evidence of the absent witness would be contrary to [his] case, or at least would not support it": *R v Raynor*, 2014 ABQB 449 at para 39
- However, other courts have suggested that this is not appropriate:
  - "There cannot and should not be a presumption that litigants must call counsel and produce privileged documents, or else risk an adverse inference. Solicitor-client privilege is a substantive right with quasi-constitutional protection. The adverse inference sought would undermine the protection of solicitor-client privilege": *Goldstein v Walsh*, 2018 ONSC 2978 at para 157

2. Fact Patterns

Fact Pattern #1

Oxford owns a shopping mall. Farmer's Market leased space and then failed to pay rent, so Oxford sued. In its Statement of Defence, Farmer's Market pleaded that it only leased the space because Oxford had represented (outside of the written lease) that the location would have high foot traffic, and its counsel did not inform it that the lease was not conditional on that representation. In fact, the mall had very low foot traffic. Oxford sought production of Farmer's Market's legal file to check whether the defendants would have signed the lease without that representation.

Vote 1: Has privilege over Farmer's Market's legal advice been waived?

Vote 2: Suppose that Farmer's Market did not say that it relied on misrepresentations, but rather only said that Oxford did not inform it that there was low foot traffic. Oxford sought production of Farmer's Market's legal file to check whether its counsel said anything to Farmer's Market about foot traffic. In that case, would privilege have been waived?

Fact Pattern #2

RBC agreed to underwrite AAA's IPO if it received documents by a specified date. Its lawyer told AAA that it could submit documents up to a week late, and AAA took her up on that. RBC took the position that AAA missed the deadline, so AAA sued for breach of contract. In its Statement of Defence, RBC pleaded that its lawyer had no authority to agree to an extension.

Vote 3: Has privilege been waived over the lawyer's instructions?

Vote 4: Suppose that RBC had just denied the allegations in the Statement of Claim about the extension, without offering an alternative story. In that case, would privilege have been waived over the lawyer's instructions?

Fact Pattern #3

Anjali sued her former employers for bad faith, alleging they sold her a book of business but undermined her ability to work with those people. Her employers pleaded they had always acted in a commercially reasonable manner. They produced 5 emails to their lawyer in which they told him to take the high road. Anjali sought all other emails to their lawyer.

Vote 5: Has privilege been waived over the other emails?

Vote 6: Suppose some of the other emails contained no instructions, but only summaries of the facts as the employers understood them. In that case, would privilege have been waived over those emails?

Fact Pattern #4

Dragomir sued a company for oppression. The company defended on the basis that the claim was statute-barred. Dragomir's lawyer accidentally produced a privileged email from Dragomir to himself. The date of the email was less than two years before the action was commenced, and at discoveries Dragomir claimed that all communications with the lawyer about this issue were after that date. The company asked for the lawyer's file to check if that was true.

Vote 7: Has privilege been waived over the lawyer's file?

Vote 8: Suppose that the email disclosed noted that they had talked on other dates more than two years before the claim was commenced, without indicating whether those conversations were about this issue or something else. Would privilege have been waived over the communications on those dates?

Fact Pattern #5

As defence counsel, Theo produced 4,000 emails, of which only about 25 were relevant to the litigation. Months later, as trial approached, Theo reviewed the documents more carefully and realized that 50 of them were privileged and should not have been produced. As soon as he realized this, he brought a motion seeking a declaration that those emails were privileged.

Vote 9: Has privilege been waived over those 50 emails?

Vote 10: Suppose there were 400,000 emails, of which 200,000 were relevant, but Theo's client could not afford to have a lawyer review them all at the discovery phase of the litigation. Would privilege have been waived over the 50 privileged emails?

Fact Pattern #6

An anonymous blog published Lupita's privileged video. Her lawyer was made aware of the posting, but since the blog had such low circulation, she did nothing to assert her rights. Six months later, CBC indicated that it intended to republish the video on its site. At this point, Lupita took steps to assert privilege and get the anonymous blog to take it down.

Vote 11: Has privilege been waived over the video?

Thank you!