Solicitor-Client Privilege — Some Misconceptions

By
Lisa Peters

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SOLICITOR-CLIENT PRIVILEGE – SOME MISCONCEPTIONS

Consider the following scenarios:

1. Company A wants to obtain an environmental assessment report in relation to problems it is experiencing with emissions at one of its plants. It has not been charged with any offence, nor is there any civil suit on the horizon. It wants to obtain the report for the purpose of improving plant practices, and to ensure compliance with environmental statutes. In-house counsel wants to make sure the report will not have to be produced should the plant's emissions ever become the subject of litigation. She concludes that if the report is commissioned by her and addressed to her, rather than the plant manager, the report will be privileged for all purposes in the future.

2. Company B has appointed corporate counsel as an officer of the company. He attends the Board meetings. Frequently he is asked to give the Board advice in relation to matters under consideration. Sometimes that advice is legal advice, but more often it would be properly characterized as business or strategic advice. Company B is not currently involved in litigation but is in an industry that has weathered some large class action lawsuits in recent history. Corporate counsel assures the Board that all the minutes of their meetings will be privileged and not producible in any proceeding because he was in attendance at all the meetings and gave, from time to time, legal advice.

3. An officer of Company C was being examined for discovery in a wrongful dismissal action. Counsel for the plaintiff asked him questions about an incident involving the plaintiff and a former employee of the company that the witness was not in a position to answer personally. When it became apparent that in-house counsel was the only person with knowledge of the factual details, counsel for the plaintiff requested that the witness inform himself through in-house counsel and respond to the questions. In-house counsel refused to supply the witness with the requested information, asserting that it was privileged.

The views of these fictional corporate counsel reflect common misconceptions held by many lawyers. The aim of this article is to address those misconceptions in the context of recent case law.

Introduction - Confusion Between Solicitor-Client and Litigation Privilege

The erroneous conclusion draw by the lawyer in scenario 1 may have arisen because she did not understand the difference between true solicitor-client privilege (also called legal advice privilege) and litigation privilege (also called solicitor's brief privilege). While certain fact patterns may give rise to both types of privilege (particularly when litigation is underway or within reasonable contemplation), there are key differences between the two, both in terms of the test for when they will apply, and the policies underpinning their existence.

Because the term solicitor-client privilege is sometimes used to embrace both of these types of privilege, I will use the terms legal advice privilege and litigation privilege in order to distinguish between them in this article.

Three recent appellate level cases should serve as primers for lawyers seeking guidance as to the distinctions between these two types of privilege: *General Accident Assurance Co. v. Chrusz* (1999), 45

O.R. (3d) 321 (C.A.); *Gower v Tolko Manitoba Inc.*, 2001 MBCA 11; and *College of Physicians of British Columbia v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665.

Legal advice privilege serves to promote full and frank communications between solicitor and client, thereby facilitating effective legal advice, personal autonomy, access to justice and the efficacy of the adversarial process. Litigation privilege is geared towards assuring counsel a "zone of privacy" and protecting the lawyer's brief from being poached by his or her adversary: *College of Physicians of British Columbia (Information and Privacy Commissioner),* at paragraph 30.

Because of this difference in rationale for the two types of privilege, litigation privilege casts a wider net, and routinely covers third party communications with counsel (as opposed to just communications between the lawyer and the client).

To fall within the wider net of litigation privilege, however, litigation must be "in reasonable prospect" at the time the communication is made, and the communication must be made for the dominant purpose of that litigation.

Scenario 1 - Narrow Scope of Legal Advice Privilege As It Applies to Third Party Communications

The lawyer in scenario 1 will not be able to meet the test for litigation privilege. Accordingly, in order for the environmental report she commissioned for Company A to be shielded from production at some future date when litigation *does* develop, she will have to satisfy the test for legal advice privilege.

Where the third party in question serves as a channel of communication between the client and solicitor, communications to and from the third party by the client or solicitor will be protected by legal advice privilege so long as those communications meet the criteria for the existence of the privilege.

For example, where the third party is a translator, assisting the lawyer and client who speak different languages to communicate, and the purpose of the communications is the giving and receiving of legal advice, privilege will attach. Similarly, where an employee of the lawyer communicates with the client to obtain information in preparation for a client lawyer meeting, the privilege will attach. Scenarios like this, where the third party is a conduit or channel of communication between the lawyer and client, have always been non-controversial examples of the application of legal advice privilege to communications involving someone in addition to the solicitor and the client.

The fact patterns that were treated inconsistently prior to the trio of appellate cases cited above were those involving third parties who were not acting as a conduit or channel of communication, but rather were providing the solicitor with information or expertise the solicitor required. Some judges took the view that as long as the solicitor was seeking out knowledge to enable him or her, ultimately, to give advice to the client, the communication with the third party must be privileged.

In *General Accident Assurance Co. v. Chrusz*, Doherty J.A. explained the limited scope of legal advice privilege to third parties who were not acting as channels or conduits at paragraphs 120-122 of his decision.

> ...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.
>
> 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 a client or if the client authorizes the third party to seek legal advice from the solicitor on behalf of 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.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

In another recent Ontario case, *Prosperine v. Ottawa-Carleton (Regional Municipality),* [2002] O.J. No. 3316 (S.C.J.), the defendants were compelled to produce an environmental report prepared for the municipality by Peat Markwick Thorne Inc. several years before the litigation was commenced. They could not reasonably rely on litigation privilege and failed in their claim of legal advice privilege when Aitken J. concluded that Peat Marwick could not be said to have acted as a simple channel of communication between solicitor and client.

In *College of Physicians of British Columbia*, expert opinions were provided to the lawyer for the College for the purpose of assessing the basis for a complaint against a physician. The B.C. Court of Appeal found that the reports were not shielded by legal advice privilege, as they were not integral to the solicitor-client relationship; the experts were simply providing information to the lawyer to be used by her in rendering legal advice to the client. Because the reports were obtained at an investigative stage, not for the dominant purpose of their use by counsel in pending or reasonably contemplated litigation, litigation privilege did not apply either.

The Manitoba Court of Appeal in *Gower v. Tolko Manitoba Inc.* appears to be somewhat more generous in defining the scope of legal advice privilege; however, it is arguable that the decision is limited to its particular facts. In that case, the document in question was a report prepared by a B.C. lawyer who had been retained by a Manitoba company to conduct an investigation into a sexual harassment claim at a workplace. Gower, the plaintiff and subject of the sexual harassment complaint, was subsequently fired and sued for wrongful dismissal. In that proceeding, he sought production of the lawyer's report. On appeal from the decision in chambers, the plaintiff abandoned his argument in relation to litigation privilege, leaving as the only issue the question of whether the report was subject to legal advice privilege.

Steel J.A. concluded that the lawyer, while conducting an investigation, did more than investigate and was acting *qua* lawyer at the relevant time. She gave legal advice and recommendations in her report. Accordingly, the report she prepared was shielded by legal advice privilege.

In *College of Physicians of British Columbia*, the B.C. Court of Appeal opined that *Gower v Tolko Manitoba Inc.* was limited to its particular facts, in that the report in question actually contained legal analysis and advice, as well as information from third parties. Levine J.A. also inferred that the lawyer in that case only interviewed employees of the company, and in that sense the report did not contain third party communications.

On an application of the principles set out in these cases, the in-house lawyer in scenario 1 will not be able to claim, on Company A's behalf, legal advice privilege over the environmental report.

Scenario 2 - Status and Role of Solicitor in Question

Arguments that in-house counsel are differently situated than private counsel, and that their clients are accordingly not entitled to assert legal advice or litigation privilege where they would otherwise be applicable have not succeeded in Canada: *Nova Aqua Salmon Ltd. Partnership (Receiver and Manager of) v. Non-Marine Underwriters, Lloyds, London*, [1994] N.S.J. No. 418 (S.C.); *Quinn v. Federal Business Development Bank*, [1997] N.J. No. 105 (S.C. - T. Div.*); R. v. CIBC Mellon Trust Co.*, [2000] O.J. No. 4584 (S.C.J.).

Privilege in relation to communications by the client with in-house counsel will not be lost simply because outside counsel is also retained: *Despins v. St. Albert (City)*, [1990] A.J. No. 43 (Q.B. - M.).

However, for a claim of privilege to be available, the in-house counsel in question must be acting in that capacity. When he or she performs work in some other capacity, such as an executive or board secretary, information is not acquired in the course of the solicitor-client relationship and no privilege attaches: *Potash Corp. of Saskatchewan v. Barton*, 2002 SKQB 301, at paragraphs 24-28.

The Supreme Court of Canada summarized the principle as follows in *R. v. Campbell*, [1999] 1 S.C.R. 565 (at paragraph 50), when considering privilege as it applied to lawyers employed by the Crown:

> It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective department. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. A comparable range of functions is exhibited by salaried corporate counsel employed by business organizations. [...] No solicitor-client attaches to advice on purely business matters even where it is provided by a lawyer.

Thus, the fictional solicitor in scenario 2 above has given flawed advice to Company B. Assuming that the minutes of the Board are relevant in some future proceeding, the company will not be able to shield the portions of the minutes dealing with the lawyers' advice in circumstances where he was not acting as a solicitor but rather was giving business or strategic advice. The balance of the minutes not dealing with his advice at all will be producible as well; the mere presence of someone

who is qualified as a lawyer does not bring them within solicitor-client privilege unless the purpose of the entire meeting was for the company seeking or receiving legal advice.

Only where the company can establish that the substantial purpose of the meeting (or particular portion of the meeting) was for the solicitor to communicate with the Board in order to give legal advice will the minutes be shielded from production: *Children's Aid Society of Hamilton-Wentworth v. A.L.*, [2000] O.J. No. 1015 (S.C.J.).

Scenario 3 - Real Evidence Exception

Legal advice privilege relates to communications between solicitor and client. Litigation privilege extends to the lawyer's working papers only. Therefore, where a solicitor has knowledge of material facts and he acquired that knowledge from sources other than his client, he may be required to answer questions regarding those facts: *Signcorp Investments Ltd. v. Cairns Homes Ltd.* (1988), 24 C.P.C. (2d) 1 (Sask. Q.B.)[1]; *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 (Div. Ct.).

The Nova Scotia Court of Appeal went further in *Global Petroleum Corp. v. CBI Industries Inc.* (1998), 172 D.L.R. (4th) 689. In circumstances where the sole source of the lawyer's knowledge of particular facts was communications with his client, the Court nonetheless required him to disclose those facts, stating at page 695:

> It is beyond dispute that privilege cannot be used to protect facts from disclosure if those facts are relied on by a party in support of its case. It is immaterial that the fact was discovered through the solicitor or as a result of the solicitor's direction.

Applying the same principles, evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction. Such evidence is not a communication shielded by legal advice privilege: *Kranz v. Canada (Attorney General)*, [1999] 4 C.T.C. 93 (B.C.S.C.).

In-house counsel for Company C in scenario 3 would have to provide the answers, provided that the lawyer conducting the discovery was genuinely seeking "facts" as opposed to details of privileged communications.

The difficulty in each case is distinguishing between facts that exist independent of the privileged communications and the privileged communications themselves: *Madge v. Thunder Bay (City)* (1990), 44 C.P.C. (2d) 186 (Ont. H.C.J.).

Conclusion

Companies cannot assume that the mere involvement of corporate counsel in the commissioning of a report will clothe that report in privilege or that the presence of corporate counsel at a meeting will have that effect. Nor can companies assume that other communications of in-house counsel with consultants, experts or other third parties in the course of investigations he or she is conducting will be shielded by privilege in subsequent proceedings.

[1] Leave to appeal refused (1988), 24 C.P.C. (2d) 1N (Sask. C.A.).

Only by considering the capacity in which corporate counsel was acting in relation to the report or other communication, and by applying the tests for legal advice and litigation privilege can the company assess the risk of the report or other communication having to be produced in litigation.

Further, where discovery of facts, as opposed to production of privileged communications, is sought, in-house counsel may find him or herself compellable as a witness.

Therefore, it is not just litigation lawyers who must have a complete understanding of the tests for legal advice and litigation privilege and how they have been applied by the courts. In fact, by the time litigators get involved, the privileged or non-privileged status of a document likely has already crystallized as a consequence of the steps taken by the client on advice of a solicitor.

Vancouver
1600 Cathedral Place
925 West Georgia Street
Vancouver, British Columbia
Canada V6C 3L2
Telephone 604.685.3456
Facsimile 604.669.1620

Calgary
3700, 205-5th Avenue SW
Bow Valley Square 2
Calgary, Alberta
Canada T2P 2V7
Telephone 403.269.6900
Facsimile 403.269.9494

Yellowknife
P.O. Box 818
200, 4915 – 48 Street
YK Centre East
Yellowknife, Northwest Territories
Canada X1A 2N6
Telephone 867.669.5500
Toll Free 1.888.465.7608
Facsimile 867.920.2206

genmail@lawsonlundell.com
www.lawsonlundell.com