

# Privilege Outside of the Lawyer/Client Communications: Is extending this protection a good thing?

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# The main privileges – a reminder

- Solicitor-client privilege
  - Communications between lawyer and client for the purpose of legal representation
  - Mere involvement of lawyer does not magically attract solicitor-client privilege
- Litigation privilege
  - Communications for the dominant purpose of adversarial litigation
- Settlement privilege
  - Communications for the purpose of resolving a dispute

# Solicitor-client privilege

- Extraordinary attention from the Supreme Court of Canada
- A quasi-constitutional substantive right rather than a “mere” evidentiary privilege
- as close to absolute as possible and should not be interfered with unless absolutely necessary
- Innocence at stake and public safety exception and crime-fraud exclusion
- Not to be legislatively abrogated by implication
- Extended presumptive ambit; accounts, dockets etc.

## The main rationale for solicitor-client privilege and the trade-off

“the need to maintain a legal system that ensures that individuals have access to specialists who will represent their interests and with whom they can be completely honest about their legal problems and needs”

By definition, a privilege (especially strong privilege) interferes with truth-finding

## The tension: An extended ambit of a strong substantive right

- Tensions can be resolved in different ways
  - Where there is excessive extension, there can be sudden pull-back much like a broken elastic band
  - or there can be weakening of the underlying right reflecting the breadth of its application

# Think about the solicitor-client context

- Criminal defence
- Family law disputes
- Regulatory offences
- Commercial disputes
- Corporate M&A
- Corporate transactional matters
- Tax planning
- Wills and Estates
- Residential real estate

# Think about other contexts

- Doctor-Patient
  - consider victim of sexual assault
  - as compared to an ophthalmologist
- Psychologist-Patient
- Social Worker-Client
- Tax Accountant-Client

# What is the right priority?

- The *Charter* gives some guidance

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

- What about legal context where life, liberty and security of the person is not in issue
- What about other contexts where security of the person is in issue
- What about legal persons as opposed to humans



# 2015 omnibus bill amended Patent Act and Trade-marks Act

## *Patent Act*

**16.1** (1) A communication that meets the following conditions is privileged in the same way as a communication that is subject to solicitor-client privilege or, in civil law, to professional secrecy of advocates and notaries and no person shall be required to disclose, or give testimony on, the communication in a civil, criminal or administrative action or proceeding:

- (a) it is between an individual whose name is entered on the register of patent agents and that individual's client;
- (b) it is intended to be confidential; and
- (c) it is made for the purpose of seeking or giving advice with respect to any matter relating to the protection of an invention.

## Interesting questions raised

- Why the priority to protecting intellectual property communications?
- What is the logical reason not to extend further?
- Does the main rationale protect intellectual property communications?
- Is the full rigour of solicitor-client privilege appropriate?
- How does regulation of agents now work?

# Thinking about elastic bands

- Waiver by disclosure to third parties is a key limit to solicitor-client privilege
- It is more difficult to justify a strong privilege when information is shared with others
  - Solicitor-client privilege and communications with the “Deal Team” – at what point does waiver occur
  - The “Common Interest” exception to waiver

## Deal Team Privilege – The Concept

- In complex commercial transactions, there are members of the deal team other than lawyers and client who are essential to the legal deal structure
- Examples of deal team members: investment bankers, accountants
- Solicitor-client privilege applies to broader team communications

# Deal Team Privilege - Why is it an Issue?

- Traditional rule
  - solicitor-client privilege only applies between solicitors and clients (and agents of clients)
  - as soon as third parties involved, privilege was lost (deemed waived)
- Impracticality of this hard and fast rule recognized by court
- Deal Team privilege clearly recognized in 2011 as a distinct concept

# Deal Team Privilege - What is the Rule?

- Exists as a concept – the question is fact based – whether it applies is determined on a **case by case** basis
- Easier to establish when you have agreements in place explaining role of non-client/non-lawyer
- Will a contract be enough? Is marking a document privileged and confidential is enough to make it privileged?
- Must still **prove** necessary and integral for third party to be involved

## Deal Team Privilege – Some Take Aways

- Step away from the third parties
  - Ask: Is the participation of third parties is necessary or simply convenient?
- Cost and risk of litigating the issue after the fact may be worse than doing it the hard way the first time
- Don't be sloppy, particularly in high risk transactions or with respect to high risk issues
- Recent law on Factual Matrix and Duty of Good Faith may increases risk

## Deal Team Privilege – Some Take Aways

- If you are going to do it, do it right
  - Put in place agreements that deal with this issue explicitly (explain role of third party, necessity of involvement, confidentiality obligations)
  - Be judicious when you do it (don't use one size fits all, send multiple emails/communications to increase risk of protecting higher risk information)
  - Continue to be clear about what is legal advice vs. business advice (make sure it is solicitor client privileged in the first place)



# Common Interest Privilege – The Concept

- “Common interest privilege implies the dynamic of parties sharing a united front against a common foe.” – Sopinka, Lederman, & Bryant
- CIP comes into play when clients with separate lawyers share privileged information for the purposes of coordinating legal activities

# Common Interest Privilege – The Concept

- Most of the jurisprudence on the subject concerns commercial transactions
- Thirteen American States have restricted CIP to litigation-related matters including situations of anticipated litigation
- Neither CIP, nor any distinction in its application has been considered by the Supreme Court of Canada

# Common Interest Privilege – The Concept

- Most recent decision in Canada:
  - *MNR v. Iggillis* December 7, 2016 Federal Court
    - Rejects CIP as an acceptable form of SCP
    - So far no cases have cited this decision
    - Under appeal to Federal Court of Appeal
- Most recent decision in U.S.
  - *Ambac*: New York – recent 2016 decision
    - Discussed in *Iggillis* at paras 23 and 24

## ***MNR v. Iggillis* 2016 Federal Court**

- The facts and background:
  - There was no Letter of Intent signed
  - Instead parties rely on Abacus Memo for laying out terms on M&A agreement
  - “In this case, the lawyers of both clients were working together to jointly arrive at an optimal tax reducing structure for the Transaction. As such the Court concludes that the Abacus memo was the fruit of cooperative efforts of both lawyers who were highly experienced in the legal considerations of income tax and related commercial law subjects.” (*Iggillis* at para 68)
- At issue: is the Abacus Memo protected by CIP?

- The Federal Court recently (December 2016) considered CIP in *MNR v. Iggillis*
  - (1) Advisory/Transactional CIP
    - any circumstances where two or more entities have shared legal interests (e.g. shared interest in a signed merger agreement or other pending transaction)

## → (2) Litigation CIP

- requires not only a shared legal interest between the parties, but that the communications at issue relate to pending or anticipated litigation in order to avoid waiver

- “The [Federal Court] concludes that the proper distinction between these two forms of CIP should be based on the underlying differences between litigation privilege and SCP. The Court relies upon the Supreme Court decision of *Blank v Canada (Minister of Justice)* in which it declared them to be ‘distinct conceptual animals and not two branches of the same tree’”.  
(*Iggillis* at para 25)

→ What is CIP before and after *Iggillis*:

→ Before:

→ “In certain commercial transactions, this sharing of opinions is for the purpose of putting the parties on an equal footing during negotiations and in that sense the opinions are for the benefit of multiple parties even though the opinions may have been prepared for a single client.” - Sopinka, Lederman, & Bryant



- “The parties in those circumstances [commercial transactions] would expect that the opinions would remain confidential as against outsiders and that mere disclosure in that context would not necessarily result in the privileged status of the legal opinions being lost.” - Sopinka, Lederman, & Bryant

→ After:

- Advisory CIP is arguably incompatible with the fundamental tenets of lawyer-client privilege and has been incorrectly accepted by the courts.
- Watson & McGowan – was *Pitney Bowes* wrongly decided?

- “Despite the [Federal] Court’s acknowledgment of the challenge it faces in terms of the recognized stature of CIP, it nevertheless is **very strongly of the view that CIP is not a valid component of SCP doctrine**”  
(*Iggillis* at para 92)

# Going forward

- Analytical Framework:
  - Step 1: Determine if Business or Legal Advice
    - Is the essential nature of the memo is legal in nature?
  - Step 2: Determine if protected from disclosure under SCP
    - If so, was the memo legal advice provided by the lawyers to their clients in the strictest confidence and protected from disclosure under SCP, subject to whether the privilege has been waived or is protected by CIP?
  - Step 3: Determine if Privilege has been waived
    - Must determine if Advisory/Transactional – and if so, disclosure waived based on *Iggillis* and *Ambac*.

- Summary of best practices/tips to remember:
  - Timing
  - Know What You are Disclosing
  - Documentation
  - Separate Discussion of Common Legal Interests from Business Interests
  - Discuss Instead of Exchange
  - Consider Jointly Retaining Counsel

## Discussion

- Does the “deal team” concept stress the privilege elastic:
  - in theory?
  - Could it in practice?
- Is “Advisory/Transactional CIP” a step too far? Does restricting CIP to Litigation CIP provide a limitation so that a “common interest” doesn’t just mean that it is “a good idea to share privileged information”

# QUESTIONS/COMMENTS



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