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PRIVILEGE:
WHEN ARE COMMUNICATIONS CONFIDENTIAL?

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A. INTRODUCTION: WHAT IS PRIVILEGE?

Put simply, privilege is the right of a person not to disclose information that would otherwise have to be disclosed under law. In more technical terms, privilege is a legal doctrine under which certain communications, made within the context of certain relationships, will be sheltered from disclosure to any other persons.[1]

In general, written and verbal communications that may be used to prove or disprove a material fact at issue in litigation must be produced for the opposition's inspection. The only exception to this rule is when the communication is privileged.

Privilege applies strictly to "communications", not to "facts". For example, in the B.C. case of *Donnell v. GJB Enterprise Inc*,[2] the Court held that a record of money paid into and out of a trust account is a fact, not a communication.

Ontario courts follow a similar approach. In *Pearson v. Inco*,[3] the Court considered whether the plaintiff had to disclose relevant facts taken from witnesses by an articled student employed by counsel for the plaintiff. The Court ruled that the physical notes taken by the articled student were privileged and not subject to disclosure, but the factual content of those privileged notes had to be disclosed.

These privileged communications may be either written or oral, so privilege applies to both documents and verbal discussions. Privileged documents are thus exempt from having to be produced for the opposition, and the opposition may not ask questions about privileged oral communications during examination and trial. There are three types of privilege that we will examine in depth:

1) Solicitor-client privilege;
2) Litigation privilege; and
3) Settlement privilege.

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[1] Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 3rd Ed.
[2] 2012 BCCA 135.
[3] [2008] O.J. No. 3589 (S.C.J.).

After examining these categories of privilege, we will discuss when privilege may be lost or waived, followed by a discussion of the evidence required to defend an attack on a claim of privilege.

B. SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege protects communications between a lawyer and his or her client. This type of privilege is considered the most important of the three types of privilege, and the Supreme Court of Canada has acknowledged it as a "fundamental civil and legal right".[4]

The reason for according such high regard for solicitor-client privilege is simple: because communications between a lawyer and his client are essential for the operation of the justice system, these communications must be given absolute protection.[5] If clients were not afforded this protection, clients may be reluctant to provide their lawyers with all of the material facts of their case, and their lawyers would not be able to provide the best legal advice possible as they may not otherwise know all of the important background information. The Supreme Court of Canada set out these concepts eloquently in its decision in *Blank v. Canada (Minister of Justice)*[6]:

> *[Solicitor-client privilege] recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted lawyers the task of advancing their client's cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice (at para. 26).*

This isn't to say, however, that just any conversation between a lawyer and his client can be privileged. In order for solicitor-client privilege to apply, each of the following three requirements must be met:

1) **The communication must be between a lawyer and his client**. Although a formal agreement or retainer is not required to meet this requirement, the lawyer must be

[4] *Solosky v. Canada*, [1980] 1 S.C.R. 821.
[5] *Smith v. Jones*, [1999] 1 S.C.R. 455.
[6] [2006] 2 S.C.R. 319.

acting in a professional capacity at the time of the communication.[7] Thus, even if a potential client chooses not to hire the lawyer, their conversations are still privileged;

2) **The communication must be made in the course of seeking legal advice**. Generally, only the communications between a lawyer and his client made for the purpose of seeking legal advice are protected. Thus, in a conversation where a lawyer provides both legal and business advice, the portion of the conversation where the lawyer gave business advice is not privileged[8]; and

3) **The communication must be made in confidence**. To meet this requirement, the lawyer and his client need not explicitly state before the conversation that the communication is meant to be made in confidence. As long as the circumstances indicate that the communication was meant to be made in confidence, privilege will apply.[9]

A case that illustrates the application of these three requirements is *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*.[10] In *Bilfinger*, a dispute between the company Bilfinger Berger and Metro Vancouver arose concerning the construction of two underground tunnels. During litigation, there were two types of documents over which Bilfinger claimed privilege: those dealing with the seeking or giving of legal advice, and those that were factual summaries of Bilfinger's situation at the time of litigation. The Court ultimately found that solicitor-client privilege applied to both types of documents because:

1) The communications were between Bilfinger and its lawyer;
2) The communications were made in the course of seeking legal advice. This included the factual summaries Bilfinger sent to its lawyer as Bilfinger had created and sent the factual summaries for the sole purpose of seeking legal advice; and
3) The communications were made in confidence as the documents were circulated only amongst select employees of Bilfinger.

Generally, solicitor-client privilege also extends to communications between lawyers and third parties in circumstances where the third party can be characterized as an "agent"

[7] *Taylor v. Cooper*, 2013 BCSC 2073.
[8] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180.
[9] *Solosky v. Canada*, [1980] 1 S.C.R. 821.
[10] 2013 BCSC 1893.

of the solicitor or client.[11] This is especially the case where a solicitor must enlist the skills of experts, such as accountants, engineers, or doctors, to either interpret their client's information or to provide an analysis of the technical aspects of a case.

However, privilege in such cases is determined on a case-by-case basis. Before applying privilege to communications between lawyers and third parties, a court will examine whether the third party's expertise was required for the lawyer to provide legal advice. In *General Accident Assurance Co. v. Chrusz*,[12] a claims adjuster who was investigating a fire loss, was directed by an insurance company to create a report for a lawyer that the insurance company had hired. But although a lower court decided that the claim's adjuster's communications with the lawyer were privileged, the Ontario Court of Appeal disagreed. The Court of Appeal held that while solicitor-client privilege extends to "messengers" of privileged information, it may not apply to mere "collectors" of information. The Court of Appeal emphasized that in order for the privilege to apply to third parties, the information the third party communicates to the lawyer must be essential for the lawyer to properly advise his client. Therefore, because the Court of Appeal considered the claim adjuster's role to be that of a "collector" of information rather than that of an expert who provided essential analysis, the solicitor-client privilege could not extend to the communications between the claims adjuster and the lawyer.

Conversely, in *Long Tractor Inc. v. Canada (Deputy Attorney General)*,[13] the Court found that the communications between a client's accountants and the client's lawyer were protected by solicitor-client privilege. The Court noted that the accountants were not merely a conduit of communication between the lawyer and the client. Rather, the accountants used their expertise to provide accounting information to the lawyer regarding the client's business, and this expertise was thus required in order for the lawyer to provide legal advice to the client.

In addition to communications between lawyers and third parties, solicitor-client privilege also extends to so-called "tripartite relationships" which arise when a lawyer is hired by an insurer to defend its insured. In *Hopkins v. Wellington* the Court held that in these common situations, the solicitor-client relationship arises between the lawyer and the insured, as well as between the lawyer and the insurer. In these situations, the lawyer has "two clients". Thus, information that a lawyer receives from an insurer which the lawyer shares with the insured, and vice versa, remains privileged.

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[11] *Susan Hosiery Ltd. v. M.N.R.*, [1969] D.T.C. 5278 (Ex. Ct.); *Pearson v. Inco Ltd.*, [2008] O.J. No. 3589 (S.C.J.); and *Seller v. Grizzle* (1994) 95 B.C.L.R. (2d) 297.
[12] [[1999] O.J. No. 3291
[13] 1999 Canlii 5583

It is also important to note that although disclosure of privileged information usually results in a waiver of the privilege, the privilege belongs to the client and is his or hers to waive.

In *Hopkins,* [14] the two drivers sued each other after a motor vehicle accident. Two actions arose wherein each driver was a plaintiff in one and a defendant in the other. The two drivers retained different lawyers for each action, resulting in the involvement of four different lawyers. An issue that arose was whether the drivers could consent to their two lawyers sharing information in the two different actions without waiving solicitor-client privilege. The Court held that because the privilege belonged to the client, privilege would not be lost by virtue of the two lawyers for the client sharing information so long as the client consented.

The solicitor-client privilege is a legal right belonging to the client. The privilege is essential for the operation of the justice system in order for lawyers to receive a comprehensive disclosure from clients as to the background facts of a case. Without this full disclosure from clients, lawyers would be unable to provide the best legal advice possible. Furthermore, lawyers will often need to rely on the opinions of third-parties for the technical aspects of a case that they may not fully understand. Solicitor-client privilege will protect communications with a third party where the communication is necessary for the lawyer to provide legal advice to his client. Finally, one client cannot assert privilege against the other in a tripartite relationship where a lawyer is hired by an insurer to defend its insured.

C. LITIGATION PRIVILEGE

Litigation privilege, also referred to as "solicitor's brief" privilege, is a protection that prevents the disclosure of documents which are made in anticipation or for the purpose of litigation. Litigation privilege is intended to allow parties in litigation to prepare their cases as best they can without having to worry about whether their preparatory materials will need to be disclosed to the opposition. By allowing each side to do so, litigation privilege ensures the efficacy of the adversarial system and ensures that a court will be in the best position to determine the truth.[15]

Litigation privilege differs from solicitor-client privilege in that litigation privilege is based on the state of a legal dispute, whereas solicitor-client privilege is based upon a special relationship between the client and the lawyer. A lawyer must be involved to give

[14] 1999 Canlii 5583.
[15] *Blank v. Canada (Minister of Justice)*, [2006] 2 S.C.R. 319.

rise to solicitor-client privilege, but does not need to be involved for litigation privilege to arise.

Despite the name "solicitor's brief", litigation privilege does not only apply to documents prepared by counsel. As long as a document was prepared by a person in anticipation of litigation (and meets the two-pronged test below), the privilege applies.
Litigation privilege will apply to a document or communication when:

1) Litigation was in reasonable prospect when the document was created; and

2) If so, where the dominant purpose for creating the document was for use in litigation.[16]

The test for determining whether a document meets these two requirements is an objective one. The two branches of this test will be discussed below.

Was Litigation in Reasonable Prospect?

In determining whether litigation was in reasonable prospect when a document was created, courts are far less interested in what the person creating the document thought than what the circumstances indicated. In *Hamalainen (Committee of) v. Sippola*[17] the B.C. Supreme Court stated that this part of the test will be met "*when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without [litigation]*."

For example, in *Spenst v. Reemeyer*,[18] the Court considered whether two reports created by an ICBC claims adjuster could be protected under litigation privilege. Although the adjuster argued that she thought that litigation at that time she created the two reports was imminent, the Court disagreed. The Court examined the circumstances and found that not only had no court action been commenced, but ICBC had not even taken a position on liability. Furthermore, there was no evidence of an investigation or even a basic inquiry regarding the plaintiff's claim in the case. Thus, the Court held that the two reports were not protected by litigation privilege and had to be produced for the opposition as

[16] *Himalainen v. Sippola* (1991), 62 B.C.L.R. (2D) 254 (C.A.). Voth Bros. v. North Vancouver, [1981] 5 W.W.R. 91 (C.A.); Paquet v. Jackman, 1980 Canlii 741; and *General Accident Assurance Co. v. Chursz* (1999), 45 O.R. (3d) 321 (C.A.).
[17] [1991] B.C.J. No. 3614.
[18] 2013 BCSC 1394.

> *The mere arbitrary assertion that this file is likely to go to litigation because this adjuster handles only litigation files and she had decided it would go to litigation is not objectively defensible on the evidence before me*. (at para. 17).

The same principles in *Spenst* can be applied in the reverse: if, during the time a document is created, liability, blame, or fault was addressed in some way which establishes that litigation was in reasonable prospect, then privilege may protect the document.

In *Mistik Management Ltd. v. Canada (Attorney General)*, [19] the Court addressed whether a letter directing an investigation of a fire that broke out at an army base, as well as the investigation report itself, were created when litigation was in reasonable prospect. The Court found that the letter directing the investigation, written by an army legal advisor to the base commander, expressed concerns about possible litigation:

> *As the matter to be investigated may give rise to potential litigation either against or at the suit of the Crown, the investigation is to be conducted with a view to obtaining evidence that will be useful instruction to the Crown solicitors and counsels.*

Thus, because the letter and the subsequent investigation reports addressed liability and fault issues, the Court held that the documents were created at a time when litigation was in reasonable prospect.

Was the Dominant Purpose for Creating the Document for Use in Litigation?

The second branch of the test requires that the communication must have been prepared or created for the dominant purpose of litigation. The determination of what the dominant purpose was when creating a document is, similarly, an objective one that considers the circumstances at the time the documents were created.
For example, in *Saric v. Toronto Dominion Bank*, [20] the Court found that various bank documents created after the discovery of irregularities at a bank branch were privileged as litigation commenced almost immediately after the irregularities arose. Because the irregularities were of a fraudulent nature, and because litigation commenced immediately as a response, the documents pertaining to these irregularities were presumed to have been created for the dominant purpose of litigation.

[19] [1997] S.J. No. 73 (SK QB).
[20] 1999 BCCA 459.

Conversely, in *Merritt v. Imasco Enterprises Inc.*,[21] The defendant created various documents and communications relating to suggestions that its withdrawal of $42 million in surplus funds from a pension plan may have been improper. Although the court found that the possibility of litigation was always present as a consequence of the withdrawal, the documents had not been created for the dominant purpose of contemplated litigation. The court came to this conclusion based primarily upon a certificate issued by the defendant which expressed their satisfaction that "*no notice, no threat of claim, and no legal proceedings have been issued…or commenced against the plan sponsors or the plan trustees…with respect to the surplus removal*". Despite the court accepting that litigation was in reasonable prospect, the evidence indicated that the documents and communications were not prepared for the dominant purpose of litigation and privilege could not be maintained

An important point to note, especially for insurers, is that courts distinguish between the so-called "adjusting" and "litigation" stages of a claim or loss in assessing the purpose behind the creation of a document. In the "adjusting" stage, a claim is usually being investigated and documents created during this stage are typically not privileged. In the "litigation" stage, steps are being taken to prepare for an actual or pending lawsuit, and documents created during this stage are commonly subject to privilege.

In *Pound v. Drake*,[22] the Court considered when an adjuster's reports could be protected under litigation privilege by distinguishing between the "adjusting" and "litigation" stages. The Court denied privilege to those documents the insurer created before denying liability as the Court considered this the "adjusting" stage. However, the Court upheld privilege for the reports created immediately after the insurer denied liability as the case had now gone into the "litigation" stage where litigation was in reasonable prospect.

However, when the circumstances of a loss are very suspicious, the "adjusting" stage may be bypassed entirely and the "litigation" stage may commence right away. In *Shaughnessy Golf Club v. Uniguard*[23], a fierce blaze started during or after an unauthorized New Year's party at the plaintiff's golf course. Highly suspicious circumstances were immediately apparent from the outset of the investigation. As a result, the Court found that virtually all investigations were made for "litigation" purposes, and that there was no reason in such a case to distinguish between the "adjusting" and "litigation" stages.

In *Hoare v. Rogers*,[24] the Court also distinguished between the "adjusting" and "litigation" stages when considering whether an adjuster's reports were protected by privilege. Here,

[21] 1992 CanLII 1369 (BC SC).
[22] [1984] B.C.J. No. 1874.
[23] 1985 Canlii 465
[24] (1999) B.C.J. No. 1354 (QL).

the insurer had hired an independent adjuster who made initial reports and took statements regarding a bicycle and motor vehicle collision. However, the insurer later hired a second independent adjuster to replace the first. The Court found that although the first adjuster's reports were not protected by privilege because they were made in the investigation, or "adjusting", stage of the case, the second adjuster's reports were privileged because the second adjuster took an approach to the case which strongly suggested that litigation was imminent. The Court found that because the second adjuster concluded in her reports that the plaintiff was becoming resistant to settlement and litigation was more likely, the second adjuster's reports had entered into the "litigation stage."

In *General Accident Assurance Co. v. Chrusz*,[25] the Ontario Court of Appeal confirmed the applicability of the dominant purpose test in Ontario. However, a recent case suggests that the court may be moving away from this test and adopting a more "liberal" approach towards litigation privilege – particularly when it comes to the work product of insurance adjusters. In *Panetta v. Retrocom*,[26] an Ontario judge upheld a claim of privilege over an adjuster's file that had been created well before litigation had commenced. In doing so, the judge concluded the moment the incident took place that gave rise to the action, the plaintiff was in an adversarial role with "*all those who would ultimately become defendants and their insurers*". He went on to rule that, "*In third party insurance claims the sole reason for any investigation by or on behalf of an insurer is because of the prospect of litigation. It is naive to think otherwise*….". This approach, which differs from much of the previous case law, has not yet been entirely adopted by any other court. However, some reliance was placed on it in the British Columbia cases of *Plenert v. Melnik Estate*[27]and *Drewniak v. Law*[28]. It remains to be seen whether this approach will be the start of an incremental judicial move away from the traditional dominant purpose test in the liability insurance context.

Recent Commentary From the Supreme Court of Canada

In November, 2016, the Supreme Court of Canada handed down further commentary on the importance of litigation privilege in the matter of *Lizotte v. Aviva Insurance Company of Canada*[29]. The case involved a demand for production of records from Quebec's Chambre de l'assurance de dommages ("the Chamber") – an organization responsible for overseeing the professional conduct of a number of representatives working in the insurance field, including claims adjusters, insurance agents and insurance brokers. In

[25] 1999 O.J. 3291.
[26] 2013 ONSC 2386
[27] 2016 BCSC 403 (SC)
[28] 2017 BCSC 1565 (SC)
[29] 2016 SCC 52

the course of an inquiry into a claims adjuster, the Chamber asked Aviva Insurance Company of Canada, to send a complete copy of its claim file with respect to one of its insureds. Aviva refused to comply on the basis that some of the requested documents were protected by litigation privilege. In response to this refusal, the Chamber filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation to produce "any . . . document" concerning the activities of a representative whose professional conduct is being investigated by the Chamber, and that this was sufficient to lift the privilege.

The Supreme Court ultimately held that the claim of privilege prevailed. In doing so, it confirmed the underlying principles that litigation privilege is a class privilege, and can be asserted against third parties, including third party investigators who have a duty of confidentiality. And because the Chamber's demand was based on a statutory authority, the court reiterated the general principle that applies to legislation purporting to derogate from such well established common law rules: it must be presumed that a legislature does not intend to change existing common law rules (such as privilege) in the absence of a clear provision to that effect. Put another way, a law intending to abrogate privilege must be absolutely clear as to its intention to do so[30].

Finally, the Supreme Court reminded us that the privilege rules are not absolute, but are subject to clearly defined exceptions (as opposed to a case by case balancing test). Recognized exceptions include those relating to public safety, to the innocence of an accused, to criminal communications, and to evidence of the claimant party's abuse of process or similar blameworthy conduct. The categories of exceptions are not closed and could presumably include an "urgency" exclusion which could be triggered by the existence of an urgent investigation in which extraordinary harm is apprehended during the period in which litigation privilege applies. However, the court left fulsome consideration of an "urgency" exception for a later date.

D. SETTLEMENT NEGOTIATION PRIVILEGE

Settlement negotiation privilege, or simply settlement privilege, protects communications and documents that are created for the purpose of reconciliation or settlement. Without this privilege, parties to litigation may be reluctant to negotiate a settlement. The repercussions of having frank settlement discussions used against a party, were the negotiations to fail, would deter parties from speaking their mind at, or even approaching, the settlement table.

[30] Also see *Alberta (Information and Privacy Commissioner) v. University of Calgary, 2016 SCC 53*

As with all types of privilege, a test is required to determine whether settlement privilege applies. This test is as follows:

1) A litigious dispute must be in existence or within contemplation;

2) The communication must be made with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed (often signified by marking a document "without prejudice"); and

3) The purpose of the communication must be to attempt to effect a settlement.[31]

To determine whether a lawsuit is in existence or within contemplation, the particular circumstances must be considered. For example, in *Arbutus Environmental Services Ltd. v. Peace River (Regional District)*,[32] the plaintiff had been negotiating a contract with the defendant. After the defendant sent proposed agreements to the plaintiff, the plaintiff responded with a letter marked "without prejudice" that set out the plaintiff's proposed amendments. Eventually, negotiations failed and the plaintiff sued on the terms of the proposed contract. But although the plaintiff claimed settlement privilege over the letter marked "without prejudice", the Court held that when the letter was sent, there was no lawsuit in existence or within contemplation. Rather, the letter referred to, and was made in the context of, a normal, everyday commercial transaction. Thus, a lawsuit was not in contemplation at the time, and the document was not created in furtherance of settlement.

As mentioned above, an intention that a communication will not later be disclosed in legal proceedings is often signified by marking a document "without prejudice". However, a mere failure to mark a document "without prejudice" does not mean that privilege is necessarily lost or establish that the communication was not made in confidence.[33] Rather, the necessary intention can still be implied through the circumstances of the case.

For example, in *Toronto-Dominion Bank v. 2055848 Ontario Ltd. (Ferrovia Bar & Grill)*, [34] the defendant had sent a letter to the plaintiff bank asking it to refrain from making a claim against her in exchange for her making payments towards one-third of a debt owed to the bank. During litigation, the bank sought production of this letter on the basis that it was not explicitly marked "without prejudice". However, the Court held that because the

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[31] Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, 3rd Ed.; *Costello v. Calgary (City)* (1997), 53 Alta. L. R. (3d) 15.
[32] 2002 BCSC 130.
[33] *Bercovitch v. Resnick et al*, 2011 ONSC 5082 (at para. 27).
[34] 2009 9430 (ON SC) at para. 17-21.

defendant's letter was clearly an attempt to reach some sort of settlement with the bank, the letter was implicitly "without prejudice" and thus was privileged.

Conversely, a document that does not otherwise enjoy settlement privilege protection cannot gain it simply by invoking the words "without prejudice". The three-part test must still be met and the particular circumstances surrounding the delivery of a communication must be carefully considered.

This implicit "without prejudice" intention overlaps with the third requirement of the settlement privilege test (i.e. a genuine attempt to settle). Thus, a finding that the purpose of a communication was to effect a settlement may also fulfill the second requirement of the settlement privilege test, as in *Toronto-Dominion Bank*.[35]

This final requirement of the settlement privilege test is, as seen above, essentially the most important. This part requires that the communication must have been made in a genuine attempt to effect a settlement. This is a determination that courts will make through a careful examination of the evidence and circumstances.

In *Bercovitch v. Resnick et al*,[36] the defendants were sued by the plaintiff for payment on two promissory notes now in default. However, in the plaintiff's reply pleading to the defendant's statement of defense, the plaintiff alleged that the defendants had attempted to settle the promissory notes by purchasing them at a discount, and that in doing so, the defendants had also acknowledged the enforceability of the notes and their obligations as guarantors.

Although the evidence suggested that the defendants were simply attempting to settle a dispute over the two promissory notes, the circumstances indicated otherwise. Instead, the Court concluded that the attempt to purchase the promissory notes at a discount was actually a "complicated and sophisticated business proposal". Even though the attempt to purchase the promissory notes would have settled the dispute between the defendant and the plaintiff, the proposal emanated not from the defendants, but from a company interested in purchasing the promissory notes. The Court noted that because the company had no dispute with the defendants and was not contemplating any type of litigation involving the defendants, the proposal could not be considered a settlement offer from the defendants, as it was actually a business proposal made in the interests of the company.

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[35] *Supra*.
[36] 2011 ONSC 5082.

In a different context, the decision in *Vander Laan v. LSMR Developments Inc.*[37] indicates that where otherwise privileged documents (such as an expert report created for litigation purposes) were disclosed by the plaintiff to the defendant on a "without prejudice" basis and "solely for the purposes mediation", then settlement privilege is maintained and protects that report from use or disclosure outside the mediation process.

Very recently, the Supreme Court of Canada restated the extent to which settlement privilege will allow negotiations conducted during a mediation to remain confidential. In *Union Carbide Canada Inc. v. Bombardier Inc.*[38], a dispute arose between two parties as to whether a binding settlement agreement had been reached during the mediation. The Court confirmed that settlement privilege protects communications exchanged by parties as they try to settle a dispute, but that such communications will cease to be privileged if disclosing them is necessary in order to prove the existence or the scope of a settlement. While it is open to the parties participating in the mediation to implement a more comprehensive and far-reaching confidentiality agreement that could protect the discussions even where the existence of an agreement is disputed, the Court confirmed that the terms of such an agreement would have to be very clear.

In multi-party litigation cases where a plaintiff settles with one defendant while maintaining its case against the others, settlement privilege still applies to protect the precise details of the settlement from the other parties who did not settle. Generally speaking, the courts require the settling parties to disclose the fact that there *was* a settlement, but not the specific details of it. A primary example of this would be where parties to a settlement entered into a B.C. Ferries/Perringer agreement.

In *Phillips v. Stratton*,[39] the plaintiff and one of two defendants entered into a B.C. Ferries/Perringer settlement agreement. However the non-settling defendant demanded that the plaintiff disclose the amount of this settlement. Dolden Wallace Folick, on behalf of the settling defendant, successfully resisted the non-settling defendant's application for disclosure of the agreement. The Court acknowledged that there are limited scenarios in which an exception can apply to require disclosure of otherwise confidential settlement agreements, but concluded that none of them applied to the case, and the privilege attaching to settlement discussions prevailed. Examples of these limited scenarios include whether there was fraud involved, or whether the settlement communications and/or documents were necessary to respond to a limitation defence. Absent such situations, the amount of the settlement remained confidential.

[37] 2012 BCSC 1936.
[38] 2014 SCC 35
[39] 2007 BCSC 1298.

However, other provinces, particularly in Ontario, have taken a slightly different position. For example, in the well-known case involving Steve Moore and Todd Bertuzzi, the Court considered when a settlement agreement must be disclosed in its entirety to the adverse parties.

In *Moore et al. v. Bertuzzi et al.*,[40] the Court ordered Todd Bertuzzi and the other defendants to disclose to the plaintiff the settlement agreement they had entered into which resulted in the dismissal of cross-claims and third party claims. This was resisted by the defendants on the basis of settlement privilege. In reviewing the case law, the Court noted there was an established line of Ontario cases which require both Mary Carter and Perringer agreements to be disclosed. In the Court's opinion, settlement privilege is not absolute, and there are exceptions where settlements must be disclosed. The reason behind this is because in some cases, a settlement agreement that is otherwise privileged will change the "adversarial landscape" and the nature of the lawsuit. The Court and non-settling parties need knowledge of this settlement in order to maintain the integrity and fairness of the trial process.

E. WAIVER OF PRIVILEGE

Although the legal right to privilege applies to any communication or document that can fit under the three types mentioned above, privilege can still be lost or waived. Privilege can be waived voluntarily, by implication, or even inadvertently.

Voluntary Waiver

Privilege can be waived voluntarily through a number of intentional acts, such as including privileged information in an affidavit or testifying about the information at trial.[41]

But although testifying at trial will waive privilege over the information attested to, using a privileged statement to refresh one's memory in court does not waive privilege for the document. In *Knox v. Applebaum*,[42] a witness had typed up a statement of what she saw shortly after witnessing an accident. The Court found that the statement was protected under litigation privilege. Furthermore, even though she had reviewed her statement

[40] 2012 ONSC 3248.
[41] *Lands v. Kaufman* (1991), O.J. No. 1658.
[42] (2012) ONSC 4181 (Ont. S.C.J.).

before testifying in an examination for discovery, the Court held that her doing so did not waive privilege for the statement.

Outside of the context of a legal proceeding, privilege can be waived when the holder of the privilege voluntarily discloses a communication or document to a third party in a manner that demonstrates an intention to waive the privilege. It is important that the voluntarily disclosure shows this intention to waive privilege, as inadvertent disclosures can still be privileged, as will be described below.

Even in cases where it was clear that a party voluntarily gave a privileged document to third parties, courts will still ask whether there was a clear intention to waive the privilege. This is demonstrated in the cases below.

In *Kamengo Systems Inc. v. Seabulk Systems Inc.*,[43] a lawyer for Canada Steamship Lines, (which was not a party to the litigation), obtained an opinion from a patent agent in order to address concerns that Canada Steamship Lines would be drawn into the already-existing litigation. Canada Steamship Lines sent copies of the patent agent's opinions to the litigation defendant in strict confidence. The defendant later sent the opinion to another company not part of the litigation. The plaintiff argued that privilege had been waived because the patent agent's opinion was not only sent to the defendant (who was not a client of Canada Steamship Line's lawyer), but also to a third party who was a stranger to the litigation.

Even though Canada Steamship Lines had voluntarily given the privileged document to the defendant, who then gave the document to the third group, the Court held that there was no intention on the part of Canada Steamship Lines to waive the privilege. Canada Steamship Lines did not intend to send the privileged document to the third group, and even when Canada Steamship lines sent the document to the defendant, it did so under strict confidence without an intention to waive its privilege. Thus, the original solicitor-client privilege still protected the patent agent's opinion.

It is important to note that pre-trial communications which reference otherwise privileged documents may result in a waiver of that privilege. In *Marlborough Hotel v. Parkmaster,*[44] the plaintiff's lawyers offered to share the results of an engineer's report with the defendant's lawyers in "an attempt to see if the problems can be resolved." Even though the offer to disclose had been made in a settlement context, the Court found that because the plaintiff's lawyer had offered to disclose the report and intended for the

[43] (1998), 86 C.P.R. (3d) 44 (B.C.S.C.)
[44] 1959 MJ No. 51

defendant's lawyers to believe that they could see the report's contents, the plaintiff was deemed to have waived privilege over the report.

Furthermore, and as confirmed in a recent decision, counsel run a real risk of waiving solicitor-client privilege when they "enter the fray" and swear affidavits in the very proceedings in which they are acting. In *Number 216 Holdings Ltd. v. Intact Insurance Co.*[45], a former lawyer for the insurer swore an affidavit in support of an application to sever the trial of coverage and bad faith issues. The affidavit referenced details of the insurer's investigation of the loss giving rise to the claim, and asserted that the investigation had been "very thorough". Because the former lawyer's affidavit "went to a matter of substance in the litigation", namely, the thoroughness of the investigation and whether that was the basis for denying the claim, the court accepted that privilege over that lawyer's file had been waived.

When voluntarily waiving privilege, a party does not necessarily have to waive privilege for all documents relating to a defined subject matter, such as all email correspondence between a lawyer and his client. A party can voluntarily waive part of a set of privileged material in what is known as limited waiver.

In *Pacific Concessions, Inc. v. Weir*,[46] the defendant had attached, as an exhibit, an email communication between himself and his solicitor. But although the plaintiff argued the defendant had waived privilege for all communications between the defendant and his lawyer, the Court found that he had waived privilege only to that email and other matters the email may have referred to.
However, waiver of part of a privileged document can result in a waiver of the whole document. This is often required based upon the principle of completeness.[47] The Court in *Chow v. Maddess*[48] followed this principle of completeness when it found that where a plaintiff voluntarily waived privilege over a statement written for her lawyer, she thus waived the entirety of the communications she had with her lawyer regarding the contents of that statement, including any notes the plaintiff's lawyer created while discussing her statement.

Implied Waiver

An implied waiver occurs when, even though a party did not intend to disclose privileged information, a court finds that fairness between the parties requires disclosure

[45] 2014 NCSC 743
[46] 2004 BCSC 1682
[47] Wigmore on Evidence, 3rd Ed. (1940), vol. 8, p. 633, at para. 2327.
[48] 1999 CanLII 2212 (BC SC).

of the privileged information.[49] While this may seem contradictory to the above-stated principle that intention is required for voluntary waiver of privilege, the question of fairness between the parties is the most important element of an implied waiver.

This question of fairness arises most often when a party to litigation puts their state of mind at issue. For example, in *Nowak v. Sanyshyn*,[50] the plaintiff attempted to avoid liability under a mortgage and a guarantee that she had signed after consulting lawyers as she claimed that her lawyers had not given her a full understanding of the documents. However, when the Court attempted to discern what it was that her lawyers told her about the documents, the plaintiff claimed solicitor-client privilege. Here, the Court found that because the plaintiff had put her state of mind directly at issue in the case, there was an implied waiver as a finding of fairness for the parties in the litigation required such a waiver.

Thus, if a party puts their state of mind at issue by making a defense or allegation in court which cannot be examined without evidence of the legal advice that the party received from its lawyer, then a court may decide that a finding of fairness merited compelling the party to disclose the legal advice.[51]

[49] *Metcalfe v. Metcalfe* (2001) 153 Man. R. (2d) 207.
[50] (1979), 23 O.R. (2d) 797 (ON SC).
[51] *Rogers v. Bank of Montreal* (1985), 61 BCLR 23.

Inadvertent Waiver

Sometimes, a privileged communication can be disclosed entirely by mistake. For example, documents could be accidentally delivered to the wrong parties, or an email meant for a lawyer from a client could be accidentally sent to other persons, thus waiving solicitor-client privilege.

Traditionally, the courts used a very strict approach in determining that privilege would be lost once disclosure occurred, even if completely by accident. More recently, however, inadvertent disclosure does not automatically result in waiver of privilege.[52] Instead, courts now look at several factors in determining whether the inadvertent waiver could be excused and privileged applied once again. These factors include:

1) Whether the error is excusable;
2) Whether an immediate attempt has been made to retrieve the information; and
3) Whether preservation of the privilege in the circumstances will cause unfairness to the opponent.[53]

Courts have since added numerous factors to this list. In *Airst v. Airst*,[54] a husband and wife were both required to send to a valuator a number of documents concerning their assets in order for the court to properly divide the assets. However, when the husband was sending his documents to the valuator, he inadvertently included two letters that were communications between himself and his lawyer. Although the valuator did not use these two letters, the wife's counsel argued that privileged had been waived for these two letters as they had been disclosed to a third party.

Here, the Court considered a number of factors in addition to the ones listed above. Although the Court did not examine the factor of whether an immediate attempt was made to retrieve the information, the Court considered factors such as the way in which the documents came to be released, and the number and nature of third parties who have read the documents.

In doing so, the Court first noted that that the disclosure here was completely inadvertent due to the carelessness of a "party in advanced years", and thus, was an excusable error. Also, the disclosure was very limited in scope and restricted to a third-party individual who was retained in a confidential capacity by the court. Furthermore, the disclosure was not "public" in the sense that many persons came to view the privileged information.

[52] *Anderson Exploration Ltd. v. Pan Alberta Gas Ltd.* (1998), 229 A.R. 191 (Q.B.).
[53] Bryant, Lederman, and Fuerst, *The Law of Evidence in Canada*, 3rd ed. (LexisNexis, 2009) §14.22
[54] (1998), OJ No. 2615 (ON SC).

Finally, the disclosure of these documents would result in a windfall to the wife and her counsel, cause unfairness to the husband, and thus was a factor pointing towards preservation of the privilege. The Court ultimately held that privilege would be upheld despite the inadvertent disclosure.

There is no strict formula in determining whether an inadvertent disclosure results in waiver of privilege. The results of an inadvertent waiver will depend largely on the facts of the case and the factors the court uses to assess whether privilege should be upheld.

A more in-depth analysis of how privilege can be lost or waived throughout the various stages in a lawsuit can be seen in Eric A. Dolden's article, *Waiver of Privilege: The Triumph of Candour over Confidentiality*.[55]

F. DEFENDING AN ATTACK ON PRIVILEGE

While a party can claim privilege over any document or communication, that privilege can be attacked by the opposition. Parties to litigation are typically required to disclose documents in their possession pertaining to the case by preparing a list of documents, including any privileged documents. But privileged documents are disclosed in a special way so that privilege can still be maintained. When a party prepares the list, they can claim privilege over all or some of the documents by stating the type of privilege they are claiming, as well as the grounds for that privilege.

But what happens when, even after describing the document and the grounds for privilege in detail, the opposition still attacks this privilege? Once challenged, the party asserting privilege has the onus of proving that privilege attaches to the document. The party can prove this by providing affidavit evidence that attests to and further expands on the grounds for privilege.

In *Hamalainen (Committee of) v. Sippola*[56], the plaintiff was riding in a camper mounted on a pickup truck when he fell out and injured himself. When the accident was reported to ICBC, an ICBC adjuster immediately directed an independent adjuster to attend the scene of the accident and to make a report. During document discovery, the plaintiff claimed litigation privilege over this report. But although the plaintiff attached affidavits from the ICBC adjuster and the independent adjuster, both of whom swore that the independent adjuster's report was made in contemplation of litigation, the claim of privilege failed on the second requirement for litigation privilege to apply: whether the dominant purpose

[55] (1990) 36 C.P.C. (2d) 56. Also available at Dolden Wallace Folick's website at www.dolden.com
[56] [1991] B.C.J. No. 3614.

for creating the document was for litigation. The Court here held that even though the circumstances of the accident and the nature of the plaintiff's injuries both pointed towards the reasonable prospect of litigation, this reasonable prospect could not, by itself, support a claim that the dominant purpose of the report was for litigation. The Court found that because the independent adjuster made the report immediately after the accident, during a period when parties are attempting to discover the cause and nature of the accident (the "adjusting" stage), the dominant purpose of the report could not be for litigation as a large part of it had to be for investigative purposes.

A situation similar to *Hamalainen* arose in *Sauve v. ICBC*,[57] where after a two-vehicle collision, ICBC directed an independent insurance adjuster to create a report. ICBC later claimed privilege over this report. However, the key difference here is that both the facts of the case, as well as the independent insurance adjuster's characterization of her report in her sworn affidavit, both supported a finding that the report was created for the dominant purpose of litigation.

The facts in *Sauve* differ in that the independent adjuster was assigned to the case and created the report about a month after the accident. This time period was considered significant because initial investigations had already been completed. Furthermore, the Court considered the insurance adjuster's characterization of her report in the affidavit evidence in which she stated that when she prepared the report, she believed the dominant purpose for its creation was litigation. The independent adjuster swore that the report consisted of her impressions concerning the credibility of the witnesses and their performances in court, should litigation occur. Thus, even though the independent adjuster's report contained other information including witness statements and photographs, her evidence that she had used this information in her report to assess witness credibility pointed towards a finding that the dominant purpose of the report was for litigation and not investigation.

From these two examples, we can see that if the opposition attacks a claim of privilege, the party claiming privilege will need to be ready to provide evidence supporting each requirement of the privilege test. Accordingly, investigators and adjusters should always be ready to explain the basis of their early investigations in order to support a claim of privilege.

In *Highline Manufacturing Ltd. v. Kaverit Cranes & Services ULC and others*,[58] Dolden Wallace Folick successfully met the onus of proving privilege and resisted an application for production of witness statements taken by an independent adjuster. In this

[57] 2010 BCSC 763.
[58] [2011] Q.B.G. No. 1124 (Sask. Ct. of Queen's Bench).

subrogated claim involving a fire that damaged most of a manufacturing plant, the defendant claimed that statements taken by an independent adjuster from two welders were not protected under litigation privilege. However, the adjuster was able to give clear evidence of the circumstances surrounding the production of the statements and the reasons they were obtained:

1) Given the particular circumstances of the fire, the adjuster strongly believed that a subrogated claim was inevitable, and thus litigation was in reasonable prospect; and
2) Although the adjuster acknowledged that her investigation was broad-reaching, she made it clear that her sole purpose for taking these two particular statements was for litigation.

The Court ultimately found that the adjuster's evidence, coupled with the facts of the case, supported and justified the claim of privilege over the statements.

G. SUMMARY

The issues surrounding privilege are complex, costly, and time-consuming to litigate. The cases and principles mentioned in this paper are but a small sample of the many different issues and complications surrounding privilege. However, knowing the three broad types of privilege, as well as the tests required to establish privilege and the ways in which it can be lost, are essential for a basic understanding of how privilege works in the legal system.

We hope this paper will assist insurance professionals in better understanding when and how information and documents can be privileged, and what steps can be taken during the life of the claim to see that communications which are intended to be confidential can remain that way.