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Protecting Communications in Anticipation of Lawsuits and CRA Audits

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Overview – Key Questions Regarding Disclosure and Privilege

A What Are Your Disclosure Obligations?

- What is required to be produced during ongoing litigation?
- What is required to be produced during a CRA audit?
- What are the potential impacts of these disclosure requirements?

B What is Privilege?

- What are the different types of privilege?
- How do these different types of privilege impact your disclosure obligations?

C What are Some Common Pitfalls and How Can These Pitfalls be Avoided?

D Key Takeaways

A. What Are Your Disclosure Obligations?

1. Ongoing Civil Litigation

- Parties are required to disclose all relevant documents in their power, possession, and control, unless subject to a type of privilege
  - "Documents" include any documents (including electronic, hand written, audio, etc.) that are relevant to the scope of the pleadings (Statement of Claim, Statement of Defence, Third Party/Crossclaim)
- A court can order production for inspection of any documents that are not privileged and that are in the power, possession, and control of a party
- If there is a dispute regarding whether privilege has been properly claimed over a document, the court may inspect the document to determine the validity of the claim
- Risks of non-compliance
  - The court has the authority to take steps against the impugned party
  - If a document is damaged or lost, the court can infer adverse interest against the impugned party

2. CRA Audit

- CRA officials are entitled to request and examine all relevant materials and/or records of a registered charity or not for profit organization as a "taxpayer" under the *Income Tax Act* ("*ITA*") and any document of the taxpayer or any other person that may relate to a taxpayer's records for the purposes of the administration or enforcement of the *ITA*
- This may include, amongst others:
  - Emails and social media accounts of the organization
  - Personal emails (if they include information about the operations of the organization)
  - All financial information, including communication with donors
  - All corporate records, including all board and committee minutes
  - All correspondence to and from the organization from and to anyone
- Similar to civil litigation, CRA auditors cannot compel production of information or documents which are subject to privilege

3. Impact of Disclosure Obligations – Practical Implications

- These disclosure obligations can arise at any time, and as such, timing is often outside of an organization's control
- Unless documents are protected by a type of privilege, they could be subject to disclosure obligations if they are relevant to an audit or to the subject of ongoing litigation
- While some documents and/or communications may be viewed as a result of their content to be sensitive, negative or otherwise intended to be kept confidential, this does not mean they are protected from disclosure as of right
- Understanding the reality and risks associated with possible future disclosure obligations is key to protecting your organization from future unnecessary and/or unintentional disclosure of sensitive and potentially prejudicial material

B. What Are the Different Types of Privilege?

1. Solicitor-Client Privilege

- Protects communications between a lawyer and their client that are made for the purpose of obtaining legal advice that is intended to be kept confidential between the parties
- Elements of solicitor client privilege:
  - A communication, either oral or written;
  - The communication must be of a confidential nature;
  - The communication must be between a lawyer and their client; and
  - The communication must be directly related to the seeking, formulating or giving of legal advice.
- Leading authority: *Solosky v. Canada*, 1980, 1 S.C.R. 821

2. Litigation Privilege

- Protects against the disclosure of documents which are prepared for the purpose of litigation
- Elements of litigation privilege:
  - Documents in question must have been created:
    - In contemplation of litigation which is in reasonable prospect; and
    - For the dominant purpose of use in the litigation.
- Litigation privilege, however, can only be asserted during the litigation process itself and does survive thereafter
- Leading authority: *Blank v. Canada (Minister of Justice)*, [2006] 2 SCR 319

3. Settlement Privilege

- Protects the confidentiality of communications and information exchanged for the purpose of settling a dispute, including (but not limited to) discussions within the context of a mediation
- Elements of settlement privilege:
  - There is a litigious dispute;
  - Communications were had with the express or implied intention that they would not be disclosed in a legal proceeding in the event that the negotiations failed; and
  - The purpose of the communications is to attempt to effect a settlement
- There are important limitations, however, to the scope and use of this privilege
- Leading authority: *Re Hollinger Inc.*, 2011 ONCA 579

4. Common Interest Privilege

- Allows for documents or communications covered by another type of privilege to be shared between parties with a common interest and a mutual intention to keep the documents/communications confidential
- Elements of common interest privilege:
  - Communications and/or documents must have pre-existing privilege; and
  - Parties are engaged in a joint effort or strategy to further common interests
- Common interest privilege is not a separate category of privilege, but rather simply extends an existing privilege to the receiving party
- Leading authority: *Iggillis Holdings Inc. v. Canada (National Revenue),* 2018 FCA 51, leave to SCC dismissed

5. *Wigmore* Privilege (Case-by-Case Privilege)

- Privilege can arise outside of the other established categories on a case-by-case basis if certain criteria are met due to special circumstances or relationships
- Elements of *Wigmore* privilege:
  - Communications must originate in a confidence that they will not be disclosed;
  - Element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
  - Relation must be one which, in the opinion of the community, ought to be sedulously (*e.g.* diligently) fostered; and
  - Injury that would enure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation
- This “basket” privilege could encompass what is previously known as priest-penitent, doctor-patient, accountant-client privilege, etc.
- This is not a blanket privilege though, and each communication has to be assessed on its individual merits
- Leading authority: *R. v. Gruenke*, [1991] 3 SCR 263

C. What Are Some Common Pitfalls and How Can These Pitfalls Be Avoided?

1. Not all communications with legal counsel are privileged

- Communications with legal counsel are not necessarily privileged as of right
  - Needs to be for the purpose of seeking, formulating or giving legal advice
- Simply copying your legal counsel on communications does not necessarily result in solicitor-client privilege for the purposes of preventing disclosure
- Similarly, communications between various parties will not be protected by solicitor-client privilege simply because legal counsel is copied for some or part of the chain of correspondence

2. Beware of inadvertent waiver of solicitor-client privilege

- If privilege is waived, even inadvertently, the protection of solicitor-client privilege will be lost and documents/communications will be deemed producible
- Examples of where privilege could be waived:
  - Copying other parties, who are not covered by the solicitor-client relationship, on communications with legal counsel
  - Forwarding or otherwise sharing privileged communications with other parties who are not covered by the solicitor-client relationship
  - Co-mingling solicitor-client communications with other communications, including those with other parties
- Keep careful track of communications involving solicitor-client privileged information within your organization to avoid inadvertent waiver of privilege
  - Take particular care when discussing legal advice in board meetings, ensuring that it is discussed in camera and that the written minutes do not set out any of the legal advice or discussion that occurred

3. Not all documents marked as privileged, without prejudice, or confidential will be protected from disclosure

- While commonly used, these labels on documents and/or communications do not automatically provide any protection from disclosure
- Content of the communication/document itself will need to be assessed in regards to whether privilege actually applies
- If there is no actual privilege, the document is not protected from disclosure, regardless of the use of these types of labels
- Labels can, of course, still be used for internal or other purposes, but improper reliance on these labels may result in inadvertent disclosure of material that is not properly covered by privilege
- Labels can also demonstrate a party's intention to keep document/communication confidential for the purposes of asserting a *Wigmore* privilege claim

4. Keep control over information within your organization

- Be cautious about the nature and scope of communications within your own organization that relate to sensitive, confidential, or potentially harmful information
- These internal communications are not necessarily subject to privilege, regardless of their confidential nature
- The more widespread the communications and/or documents are shared within the organization, the more challenging it may be to assert that materials were intended to be kept confidential and/or to manage the content of sensitive documents/communications
- Consider limiting such communications to a small team within the organization, where possible
- Caution should be exercised proactively, and regardless of whether there is imminent threat of disclosure requirement, to minimize future exposure

5. Do not share sensitive or confidential information outside of your organization

- Sharing of documents, communications, or information outside of your organization significantly increases the risk of inadvertent disclosure:
  - Could result in the inadvertent waiver of privilege over certain documents/communications
  - Could result in inquiries of other individuals outside of the organization to whom the information was disclosed about what was shared
- If information is required to be shared outside of the members of the organization, extreme caution should be exercised in doing so
- This includes the sharing of information with former members or directors of the organization or with friends and family

6. Avoid use of personal accounts and/or devices

- Similarly, the use of personal email accounts and/or devices to communicate information or share documents pertaining to the organization, also poses significant risk:
  - Could result in the inadvertent waiver of privilege over certain documents/communications if they are sent or forwarded to personal accounts/devices
  - Could result in the requirement that personal email inboxes, text messages, phone logs, etc. be disclosed or that access be provided to same for inspection
- Where possible, avoid or significantly limit the use of personal accounts and/or devices for operations related to your organization
- Where possible, utilize email accounts associated with the organization or create a dedicated email account that is only used for the purposes of the organization

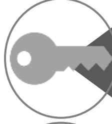
7. Maintaining privilege in communications with third party advisors/experts

- No inherent legal privilege with respect to communications between clients and accountants, public relations consultants, therapists/counsellors, doctors, etc.
- Types of privilege that could be applicable: solicitor-client, litigation, *Wigmore*
- Example: Claims of solicitor-client privilege can extend to the continuum of communication in which the lawyer tenders advice, wherein a third party is engaged by the lawyer for the purposes of providing legal advice
  - The nature and scope of the relationship should be carefully defined and limited to ensure that privilege is able to be asserted and protected
  - Caution should be exercised in the manner in which the third party advisor/expert is retained
    - Lawyer directly retaining the third party advisor/expert is best practice, regardless of how the third party advisor/expert is compensated
  - Content of the communications should be strictly limited to the defined scope of the relationship to avoid accidental waiver of privilege
- Recent case: *Coopers Park Real Estate Development Corporation v. His Majesty The King*, 2024 TCC 122

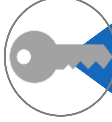
Privilege can and is a powerful tool to protecting sensitive/confidential information, but if not fully understood and asserted, privilege can disappear

D. Key Takeaways

Understand the reality of disclosure obligations - “confidential” does not always mean privileged


No “blanket” rule - not all correspondence with legal counsel is inherently privileged

Labelling a document as “privileged” or “confidential” does not automatically result in privilege under the law


If you forward legal advice/discussions to anyone outside of the organization, including former members, directors, friends, or family, privilege will be automatically waived

Heidi N. LeBlanc, J.D. – Heidi is a litigation associate practicing out of Carters’ Toronto office. Called to the Bar in 2016, Heidi has a broad range of civil and commercial litigation experience, including matters pertaining to breach of contract, construction related disputes, defamation, real estate claims, shareholders’ disputes and directors’/officers’ liability matters, estate disputes, and debt recovery. Her experience also includes litigating employment-related matters, including wrongful dismissal, sexual harassment, and human rights claims. Heidi has represented clients before all levels of court in Ontario, and specialized tribunals, including the Ontario Labour Relations Board and the Human Rights Tribunal of Ontario.

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