



Legal Privilege

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This guide to solicitor-client privilege and litigation privilege does not replace specific legal advice. Our lawyers at Bennett Jones LLP would be happy to provide you with legal advice particular to your circumstances.

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Legal Privilege

Privilege provides special protection that exempts certain documents and other forms of communication from having to be disclosed in legal proceedings. Its protection is powerful, but it can be easily lost if the privileged information is handled incorrectly. This guide has been created to provide basic information about privilege in Canadian law and suggest ways to protect it. For example, the guide elaborates on the following steps that we suggest be taken to best protect privilege:

1. Identify privilege issues and privileged information early on.
2. Label privileged documents appropriately and judiciously.
3. Ensure where possible that potentially privileged communications flow through a lawyer.
4. Manage the dissemination of documents in respect of which privilege may be asserted, both to ensure that the necessary element of confidentiality is not lost and to avoid inadvertent disclosure.
5. Conduct sensitive external or internal investigations under the direction of counsel, preferably external litigation counsel.
6. Have counsel retain any experts that are engaged for the investigation.
7. Ensure care is taken with email and with who is copied on the email.
8. In-house counsel should take steps to segregate or otherwise differentiate files and documents in which the lawyer performs non-legal functions so that the role of the lawyer is not confused.

We begin with an overview of the two kinds of legal privilege, solicitor-client privilege and litigation privilege, and then discuss privilege in the context of in-house counsel. Next, we explain how privilege works in some common specific situations before turning to a discussion of how privilege can be lost. Finally, we provide a list of some precautions that can help to maintain privilege.

A. PRIVILEGE

Privilege exempts documents and other forms of communication from having to be disclosed in legal proceedings. Canadian law generally requires all relevant and material evidence relating to the issues before a court to be disclosed to all parties in the proceeding. This requirement is subject to a number of exceptions in which Canadian law recognizes that the public interest in preserving and encouraging particular confidential relationships justifies a departure from the general rule that all relevant and material evidence be disclosed. Canadian law allows such communications to remain privileged and be exempt from disclosure.

Legal privilege is one of the most well-recognized such privileges. By successfully invoking legal privilege, a person is entitled to resist the disclosure of information or the production of documents to which an opposing litigant would otherwise be entitled: *Blood Tribe Department of Health v Canada (Privacy Commissioner)* (2008, SCC). Canadian law generally recognizes two categories of legal privilege: solicitor-client privilege and litigation privilege. Solicitor-client privilege, also known as legal advice privilege, prevents disclosure of information communicated to the lawyer for the purpose of obtaining legal advice, as well as information communicated to the client by the lawyer in order to give legal advice. Litigation privilege protects any documents or communications created for the dominant purpose of preparing for existing or anticipated litigation. These two categories of legal privilege may overlap on occasion but they, at least theoretically, operate quite separately.

1) Solicitor-Client (Legal Advice) Privilege

Solicitor-client privilege protects communication between lawyers and their clients when created for the purpose of giving legal advice. Canadian law recognizes that the proper administration of justice requires that people have the ability to be completely candid with their lawyers and to be secure in the knowledge that any such communication will not have to be disclosed in legal proceedings (subject to certain narrow exceptions, such as the communication cannot be to further the commission of a crime or a fraud, or pose a serious, imminent threat to public safety). The requirements of legal advice privilege are:

1. the communication must be between the lawyer and the client (written or oral);
2. the communication must be connected to obtaining legal advice, not business or other non-legal advice;
3. the communication must be confidential (e.g., no strangers present); and
4. there must have been no waiver of confidentiality (e.g., subsequent disclosure to strangers).

It is important to note that privilege does not attach to every communication between the lawyer and the client. Merely having a lawyer participate in the discussion is not enough to cloak the communication with solicitor-client privilege. The communication must involve the provision of legal advice. However, the privilege extends to all forms of communication including faxes, voicemail, email and other information stored digitally.

The relevant communication or document need not contain the actual legal advice, provided it forms part of an exchange to obtain or receive legal advice. Unsolicited legal advice is also protected, provided there is a solicitor-client relationship. The privilege does not cover requests that a lawyer provide mere factual information.

The key is that the communication must concern legal advice.

Therefore, for example, it has been held that a lawyer's real estate transaction file and its related records, including its accounts and ledgers, were not to be protected by solicitor-client privilege because they were records of particular actions, not communications for the purposes of seeking or giving legal advice: *Westra (Re)* (2009, ABQB).

Further, as noted, the communication must be kept confidential. Solicitor-client privilege requires: that a client communicate in confidence to a lawyer; generally that no other parties be present; and that the advice not be shared with other parties. However, the privilege, unless waived, lasts forever, even surviving the death of the client.

2) Litigation Privilege

Litigation privilege protects communication among lawyers, their clients, and third parties which has the dominant purpose of preparing for current or anticipated litigation. It arises from the adversarial system of litigation in Canada, which allows each party to control fact-presentation before the court and decide for themselves which evidence and what means each will use to prove their case, without fear that their preparations will have to be disclosed. The requirements for litigation privilege are:

1. there must have been current litigation or a reasonable contemplation of litigation at the time of the communication;
2. the dominant purpose for the creation of the document must have been its intended use in actual or reasonably contemplated litigation;
3. the communication must have been confidential; and
4. there must not have been any waiver of confidentiality.

The dominant purpose test has now been generally accepted in Canada and has been the source of many of the disputes over privilege. Dominant purpose means that the primary purpose of the communication, at the time it occurred, was to prepare for litigation, either existing or anticipated. Litigation need not be the only purpose of the communication, but it must be the primary purpose. Conversely, it is not sufficient if preparing for litigation was one of several purposes of the communication: it must be the dominant purpose.

Therefore, if handled correctly, material prepared for the dominant purpose of litigation may still be used for secondary, non-litigation purposes. In order to use the communications or documents for multiple purposes, care must be taken to demonstrate that the dominant purpose remains litigation, notwithstanding the other uses of the material (for example, by employing explicit warnings on the documentation that it is prepared for litigation and by preserving its confidentiality).

The communication need not be related to the preparation of legal advice, and the involvement of lawyers is not strictly required. Any communications or documents created for the dominant purpose of preparing for litigation will attract the privilege, regardless of whether or not a lawyer was involved in their creation. However, if the document is shared with parties outside those immediately involved in its creation, the privilege may still be lost. The privilege will also end when the litigation, including all closely related proceedings, is over: *Blank v Canada* (2006, SCC).

3) Similarities and Differences

There are many similarities between the two types of legal privilege. Both extend to all forms of communication including faxes, voicemail, email and other information stored digitally. Even statements of account rendered by a law firm are generally privileged. Also, both categories of privilege require an element of confidentiality in the communication. Privilege can be lost if one fails to maintain

confidentiality, and one cannot normally maintain privilege over something that is not confidential in nature. Additionally, both types of privilege may not apply to all proceedings, only those of a judicial or quasi-judicial nature. An Alberta decision held that litigation privilege did not apply to preparations for proceedings before the Municipal Tax Assessment Review Board: *Alberta Treasury Branches v Ghermezian* (1999, ABQB).

Despite these similarities, there are three important differences between the two types of legal privilege. First, solicitor-client privilege exists until waived (unless disclosure is required by one of the narrow exceptions, such as to prevent a serious threat to public safety) whereas litigation privilege ends with the litigation. Second, solicitor-client privilege always requires a lawyer, while litigation privilege can exist without a lawyer's involvement so long as the document was created with the dominant purpose of preparation for litigation. Finally, although both types of privilege normally require confidentiality, litigation privilege can sometimes attach to non-confidential documents that are assembled for the purposes of litigation, at least with respect to the copies of such documents in the hands of the lawyer or party preparing for litigation. This is because the combination of the documents may disclose the party's litigation strategy.

B. PRIVILEGE AND IN-HOUSE COUNSEL

In Canada, both categories of legal privilege should apply equally to the advice and activities of in-house lawyers as they do to the advice and activities of external lawyers. In *R v Campbell* (1999, SCC), the Supreme Court of Canada expressly endorsed the right of in-house counsel to claim privilege. The in-house designation did not affect "the creation or character of the privilege". This position was confirmed in *Pritchard v Ontario* (2004, SCC).

With respect to solicitor-client privilege, in-house lawyers must be acting in their capacity as legal advisors. A lawyer cannot assert this

privilege over non-legal advice, for example, business advice given to a client. The Supreme Court of Canada reaffirmed this requirement in *R v Campbell* (1999, SCC). There the Court noted that government lawyers might be called upon for policy advice that had nothing to do with legal matters. The Court recognized that a comparable range of functions existed for in-house lawyers. However, where the purpose is to provide legal advice, solicitor-client privilege can be claimed.

In practice, however, some caution must still be applied when relying on solicitor-client privilege with respect to in-house lawyers. Courts will more readily find that in-house lawyers were providing non-legal business advice to their corporations than if external lawyers were involved. In important or particularly sensitive matters, it is wise to have the advice, and the discussions and investigations leading up to the advice, procured through external counsel.

If or when an in-house lawyer engages in non-legal functions, steps should be taken to segregate or otherwise differentiate the lawyer's legal work from the lawyer's non-legal work, for example by keeping separate files for each. This will allow the in-house counsel to better demonstrate which files are protected by legal privilege and which are not. Where mixing in-house roles within a file is unavoidable and the matters are particularly sensitive, avoid documenting legal advice in the same document as business advice, and, where appropriate, inform the reader why you are doing this.

C. PRIVILEGE AND COMMON SITUATIONS

There are some specific circumstances where questions of privilege often arise. The discussion below concerns whether and how privilege applies in four common situations.

1) Accident and Serious Incident Investigations

One of the most contentious aspects of privilege concerns the investigation of accidents and similar incidents, such as suspected

environmental contamination. Accident reports, investigators' reports, and similar exchanges most often raise the question whether they are privileged. In order for these documents to be protected by litigation privilege the dominant purpose must be preparation for litigation, tested as of the time the documents were created. Courts have said that the dominant purpose is not to be coloured by reference to subsequent developments. If litigation later materializes, it does not retroactively characterize the report as having been prepared for the dominant purpose of litigation if that was not the original intention.

In the wake of an incident there will often be an immediate investigation to determine the cause and to attempt to determine what should or must be done as a result. Documents generated as part of this initial investigation may not be privileged, but at some point the initial investigation may give way to an investigation in order to prepare for litigation. There is no set point at which this occurs. Instead, the point at which an initial investigation ends and an investigation for the dominant purpose of litigation begins may depend on the results of the initial investigation: *Canadian Natural Resources Ltd v ShawCor Ltd* (2013, ABQB).

However, while the issue is usually litigation privilege, it may also be appropriate to claim solicitor-client privilege if a lawyer is involved in directing the investigation. Solicitor-client privilege is less strict in its test of the document's purpose, but stricter against the involvement of third parties: *SNC-Lavalin v Citadel General Assurance* (2003, ONSC).

The involvement of in-house counsel in such investigations, instead of external counsel, increases the complexity of the analysis. In-house counsel may be more readily seen as having a separate, non-legal role as an investigator and not as a lawyer: *College of Physicians v BC* (2002, BCCA). However, when a lawyer is involved, any communications containing legal advice should be protected by solicitor-client privilege, even if the investigation itself is not found to be for the dominant purpose of litigation and thus not subject to litigation privilege.

2) Fraud

Both solicitor-client privilege and litigation privilege will not protect communications in furtherance of a crime or fraud, whether the lawyer was aware of this or not. This loss of privilege applies only to fraud or criminal conduct and actions. It does not apply to actions which are merely unlawful, such as torts or breaches of contract. Privilege will also not arise where the document itself is fraudulent or criminal in nature.

3) Settlement and Without Prejudice Negotiations

The privilege which attaches to settlement negotiations and without-prejudice exchanges is a different privilege that is distinct from solicitor-client and litigation privilege: settlement privilege. “Without prejudice” communications are protected with privilege to serve the societal interest of promoting settlement and avoiding or limiting litigation where possible. It is not even necessary that lawyers be involved for a successful claim of settlement privilege.

However, litigation or contemplated litigation must be involved to successfully claim this privilege as it exists to protect confidential negotiations made to settle litigious disputes. It does not apply to other settlement negotiations, for example, negotiations to resolve a contractual dispute, unless the dispute has progressed to the stage that litigation is contemplated or underway.

While documents are commonly labeled “without prejudice” to invoke this privilege, it is not strictly necessary. However, labeling a document “without prejudice” assists with demonstrating a party’s intentions to assert the privilege. Conversely, merely labeling a document “without prejudice” does not make an otherwise unprivileged document privileged.

There must be some potential for compromise or negotiation in, or reasonably connected to, the document for it to be protected: *Bellatrix Exploration Ltd v Penn West Petroleum Ltd* (2013, ABCA). The privilege will be given a broad scope and will attach not only to

communications involving offers of settlement, but also to those which are reasonably connected to the negotiations.

Once a settlement is successfully concluded, this privilege will attach to the settlement agreement itself: *Sable Offshore Energy Inc v Ameron International Corp* (2013, SCC). Thus not only are the negotiations leading up to a settlement privileged, whether or not a settlement is reached, but so too are the terms of any settlement agreement that is achieved, including the final amount agreed to.

The privilege belongs to both parties and cannot be unilaterally waived or overridden: *Bellatrix Exploration Ltd v Penn West Petroleum Ltd* (2013, ABCA). However, if there is a dispute over whether a binding settlement was made, or over the interpretation of the settlement, then privilege may be lost on the basis that the communications are relevant to establishing the existence of the agreement or aid in its interpretation: *Comrie v Comrie* (2001, SKCA).

4) Lawyers from Other Jurisdictions

Solicitor-client privilege may protect communication only with lawyers who are lawfully entitled to practice law in the jurisdiction for which they provided the advice: *Canada v Newport Pacific Financial Group* (2010, ABQB). This would mean that in regard to providing advice on Alberta law, only communications with an Alberta lawyer would be protected by solicitor-client privilege. This area is controversial, and other cases have protected communication with a foreign lawyer in Canada regarding Canadian law even though the lawyer is not entitled to practice law in Canada.

To protect against this controversy, in important or sensitive matters, it is best to seek such advice only from lawyers qualified to practice in Alberta, or, at a minimum, for the foreign lawyer to be an intermediary between the client and an Alberta lawyer so that the role of the foreign lawyer is to provide information or instructions to the Alberta lawyer. Further, in the reverse situation in which Alberta lawyers are asked to provide advice in areas governed by foreign law,

it would be prudent for the Alberta lawyer to consult with lawyers qualified to practice in that foreign law, so that the Alberta advice is preparatory to obtaining that foreign advice.

Advice by a foreign lawyer on foreign law that is provided in Alberta should also be protected. More controversial is whether such foreign legal advice is protected if given outside of Alberta (and particularly if given outside of Canada). Traditionally, legal privilege has been characterized as a procedural matter for conflicts of laws analysis, leading to the risk that its existence will be governed by the law of the place in which the advice is given. If the advice is not privileged in the foreign jurisdiction, there is a risk that it would not be protected in Alberta proceedings. However, the Supreme Court of Canada in *R v National Post* (2010) stated that solicitor-client privilege is a matter of substantive law, which would, under traditional conflict of laws rules, mean that its existence would be governed by Alberta law, not foreign law, in Alberta proceedings. That would result in foreign legal advice provided outside of Alberta or Canada being recognized in Alberta proceedings as privileged. These areas remain uncertain under Alberta law.

D. WAIVER OF PRIVILEGE

Barring consent of the client to disclosure, solicitor-client privilege remains in effect forever, while litigation privilege exists until the conclusion of the litigation, including any related proceedings. However, both kinds of privilege will be lost where the privilege holder waives the privilege, either explicitly or implicitly. Waiver generally requires that the client be aware of the privilege and intends to give up the benefit. However, privilege can be lost through carelessness, specifically due to loss of confidentiality through disclosure of the information. Not all inadvertent acts of disclosure will constitute a waiver of privilege, though there does not have to be a clear intent to waive privilege before it can be lost.

1) In-House Disclosure

Otherwise-privileged communications do not lose their confidentiality within a corporation merely by being shared with or between non-management employees. However, wider dissemination greatly increases the risk that persons will disclose the information or that it will otherwise be seen to have lost its confidential character. Further, the corporation must carefully ensure that the persons receiving the information have an interest in obtaining it. If the distribution is to persons who have no apparent need to know, a court is more likely to find that the necessary confidentiality was not maintained and that privilege has been waived.

Legal advice and other privileged information contained in the minutes from a meeting of the board of directors are subject to privilege: *CKUA Radio Foundation v Hinchliffe* (1999, ABQB). That portion which contains the privileged communication should be explicitly deleted from the producible document.

However, privilege does not protect evidence on collateral matters, such as the process whereby the advice was given, or the client's actions as a result of the advice. Further, where minutes record an action taken upon legal advice, that is a fact rather than advice and is not likely privileged.

2) Disclosure to Third Parties

In general, as soon as a third party knows the information it ceases to be privileged, as the sharing of information is seen as indicating that the client has given up the privilege.

Parties with a common legal interest in the advice, even if not the actual client of the lawyer, may be present when the advice is given provided they respect the confidentiality of the communication. It is also generally thought that sharing privileged information with an affiliated corporation is permissible without losing privilege provided the corporation shares common interests with respect to the privileged information, or the in-house counsel involved has

both affiliated corporations as clients. However, some commentators, referring to US law, have questioned whether this “common interest” exception applies unless both parties are represented by separate lawyers and the communication of the otherwise-privileged information is in order to coordinate their legal activities.

As this is a developing area of the law in Canada, in a particularly sensitive case, it may be prudent to conduct such communications between interested third parties, or affiliated corporations, through their respective counsel, be they in-house or external. Further, privilege may be lost in the event of a conflict between the interested third parties or affiliated corporations, as the information would no longer be confidential as between the client and the outside party. In such a case, one corporation could use the information against the other: *Boreta v Primrose Drilling Ventures Ltd* (2010, ABQB).

3) Partial Disclosure

There is a concept of limited waiver which has been applied to protect disclosure to a corporation’s auditors. The waiver extended only to the auditors: *Philip Services v OSC* (2005, ONSC).

It sometimes happens that for tactical reasons a party chooses to disclose to an opposing litigant a portion of a privileged communication. However, disclosure of part may automatically result in loss of privilege over the whole document, despite what the disclosing party intended. If the court finds that the other party may have been misled by partial disclosure, privilege over the whole document will likely be lost.

E. PRECAUTIONS TO MAINTAIN PRIVILEGE

Not all information has the potential to attract privilege, but it is best to claim privilege wherever possible. We suggest the following steps be taken to best protect privilege. The steps do not ensure that privilege will be maintained, but they will improve the chances that privilege will be respected.

1. Identify privilege issues early on.
 - a. Solicitor-client privilege requires legal advice, whereas litigation privilege is determined by the dominant purpose of the document at the time of its creation.
2. Apply self-serving labels judiciously.
 - a. Labeling documents “privileged and confidential” and memorializing the intent to conduct an investigation or undertake other activities in preparation for litigation will assist, though not guarantee, a successful claim of privilege.
 - b. The label will also serve as a reminder to others to take care how the documents are later used or disseminated.
3. Ensure where possible that communications flow through a lawyer.
 - a. This is essential for solicitor-client privilege and assists in the ability to assert litigation privilege.
4. Manage the dissemination of documents in respect of which privilege may be asserted, both to ensure that the necessary element of confidentiality is not lost and to avoid inadvertent disclosure, which could be damaging.
5. If investigations are needed, have counsel order them.
 - a. Undertake investigations only under the direction of counsel, preferably external litigation counsel.
 - b. Make it clear in any documentation establishing or explaining the investigation that its purpose is to produce a report for use by counsel in providing legal advice and for use in anticipated litigation.

- i. If there is a company policy mandating investigations, that policy should reference the dominant litigation purpose.
 - c. Have counsel retain any experts that are engaged for the investigation.
 - d. Have counsel brief any investigators and those with access to the investigation materials with respect to legal privilege and its preservation.
 - e. Have counsel instruct the investigators that the report and all associated information and documentation is to remain confidential for the use of counsel and is not to be released to anyone outside of the legal team or investigative team.
 - i. In particular, care should be taken with email. Litigators frequently encounter challenges in maintaining privilege when email is carelessly copied or forwarded to third parties, jeopardizing its confidential status and thereby its privilege.
 - f. When investigation reports are to be discussed in-house, have counsel present them for comment.
 - g. Discourage internal discussions about matters under investigation except in the presence of counsel.
- 6. Where any lawyer engages in non-legal functions, whether in-house counsel or in private practice, steps should be taken to segregate those files or otherwise to differentiate that which is undertaken in a legal capacity from that done in other capacities.

F. CONCLUSION

We trust that the above discussion has been useful. We attach an appendix reviewing various case studies that might provide further assistance. Please do not hesitate to contact us to obtain specific legal advice particular to your circumstances.

Key Privilege Risks	How Bennett Jones LLP Can Help
Failing to identify potentially privileged communications.	Advising whether specific communications may be privileged.
Losing privilege over communications with in-house counsel due to the perception that in-house counsel may also have a non-legal role.	Advising and assisting in particularly important or sensitive matters as external counsel. Role less likely to be misperceived.
Losing privilege due to investigations being deemed not to be for the dominant purpose of preparing for litigation.	Acting as external litigation counsel, directing investigations, attending in-house investigation discussions, and presenting investigation reports for comment.

Key Privilege Risks	How Bennett Jones LLP Can Help
Losing privilege over legal advice given in Canada by a foreign lawyer who is not entitled to practice in Canada.	Acting as Canadian counsel so that the role of the foreign lawyer is to provide information or instructions to the Canadian lawyer, thus making it more likely the legal advice will be protected.
Losing confidentiality over communications and thus losing privilege. For example by sending an email to too many recipients.	Briefing staff and investigators on the importance of confidentiality and how to maintain it, and reviewing communications before transmission to ensure that confidential material has been removed.

Appendix A: Case Studies

The following case studies are intended as a further guide to the nature and operation of the law of privilege.

1. *Pritchard v Ontario (Human Rights Commission)* (2004, SCC): Solicitor-Client Privilege

Ms. Pritchard sought production of a legal opinion prepared by the staff lawyer for the Ontario Human Rights Commission about her sexual harassment complaint. She had argued that, as a human rights complainant, she shared a “common interest” with the Commission in the legal opinion.

The Supreme Court of Canada held that solicitor-client privilege protects communications between an administrative board and its in-house counsel to the same extent as communications with corporate counsel in the private sector.

The Supreme Court’s commentary on this issue makes clear the high status given to solicitor-client privilege:

- the privilege covers “any consultation for legal advice, whether litigious or not”;
- once established, the privilege is “considerably broad and all encompassing”;
- it attaches to “all communications made within the framework of the solicitor-client relationship”;
- the necessary relationship “arises as soon as the potential client takes the first steps”;
- the privilege does not extend to communications:
 - (a) where legal advice is neither sought nor offered;
 - (b) that are not intended to be confidential; or
 - (c) that have the purpose of furthering unlawful conduct.

Moreover,

- the privilege is “jealously guarded and should only be set aside in the most unusual circumstances”;
- the privilege must be nearly absolute;
- exceptions to solicitor-client privilege will be rare;
- once established, an assessment of the privilege “does not involve a balancing of interests on a case-by-case basis.”

Appendix A: Case Studies

2. *Blank v Canada* (2006, SCC): Solicitor-Client Privilege and Litigation Privilege

Mr. Blank, as a director of a corporation (Gateway), was charged with offences under the *Fisheries Act*. After those proceedings were stayed, Blank sued the government for conspiracy, perjury, and abuse of its prosecutorial powers. He applied under the federal *Access to Information Act* for government records, some of which were refused on the basis of solicitor-client privilege.

The Supreme Court of Canada held that a reference to solicitor-client privilege as an exception to disclosure under the federal *Access to Information Act* (s 23) included both solicitor-client and litigation privileges, as the section incorporated the common law of privilege.

The Court also held that, although solicitor-client privilege is not limited in time, litigation privilege is extinguished when the litigation which gave rise to it ends, unless the subsequent proceedings are “closely related proceedings.”

3. *Blood Tribe Department of Health v Canada* (2008, SCC): Solicitor-Client Privilege

An employee terminated by the Blood Tribe Department of Health sought access to her employee file. When the employer refused, the employee filed a complaint with the federal Privacy Commissioner. The Privacy Commissioner requested the file from the Health Department under the federal *Personal Information Protection of Electronic Documents Act* (PIPEDA), which gives the Commissioner express statutory power to compel a person to produce any records the commissioner considers necessary to investigate a complaint “in the same manner and to the same extent as a superior court of record”. The Health Department refused to hand over correspondence with its lawyer that was contained in the employee’s file, saying it was protected by solicitor-client privilege.

The Supreme Court of Canada agreed that the Health Department did not have to turn over the communication with the lawyer, holding that general words of a statutory grant of authority to a Parliamentary officer such as the Privacy Commissioner do not confer a right to access privileged documents, even for the limited purpose of determining whether the privilege is properly claimed.

Appendix A: Case Studies

That role is reserved for the courts. Express words are necessary to permit a statutory official to “pierce” solicitor-client privilege, which is fundamental to the proper functioning of our legal system. PIPEDA lacks such clear and explicit language.

4. *Sable Offshore Energy Inc v Ameron International Corp* (2013, SCC): Settlement Privilege

Sable Offshore Energy Inc sued a number of defendants and ultimately settled with most of them. These settlements were Pierringer Agreements, which allow the settling defendants to withdraw from the litigation while permitting the action to continue against the remaining defendants. Ameron and Amercoat did not settle. The terms of the agreements, but not the final settlement amounts, were disclosed to Ameron and Amercoat, who in turn sought disclosure of the settlement amounts. Sable took the position that the amounts were protected by settlement privilege.

The Supreme Court of Canada held that not only were the amounts protected by settlement privilege, but so were the terms of any concluded settlement agreement. The Supreme Court reviewed the policy consideration behind settlement privilege, specifically the desire to encourage settlement, and determined that this consideration applied equally to completed agreements. The Supreme Court reasoned both that parties would no more wish to disclose the terms of their agreements than the negotiations leading up to those agreements and that final agreements reflect the admissions, offers, and compromises made during negotiations. Thus, settlement would be promoted by including the content of completed agreements as privileged.

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