Solicitor-Client Privilege Within Business Enterprises and Email Communications Involving In-House Counsel

by

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SOLICITOR-CLIENT PRIVILEGE WITHIN BUSINESS ENTERPRISES AND EMAIL COMMUNICATIONS INVOLVING IN-HOUSE COUNSEL

Documents protected by solicitor-client privilege have traditionally been kept by business enterprises in a single location, in folders identified as privileged & confidential, or in locked filing cabinets. In addition, access to such documents was often restricted to a few select individuals within the organization. However, with the advent of electronic document management and the increased use of emails, the filing of privileged information and documents has become considerably less controlled, and maintaining their confidentiality has consequently become a lot more complex.

New communications technologies have given rise to problems which are important to be aware of, particularly where business enterprises and their legal departments are concerned. This is because the nature of the work performed by in-house counsel is such that these lawyers are called upon to perform actions or give advice that are sometimes legal in nature and other times not. Consequently, when it comes to determining whether certain communications are protected by solicitor-client privilege, the fact that an in-house counsel was one of the parties involved in the communications is not always sufficient. Many communications are exchanged in the normal course of business, and some will inevitably involve trade secrets, but that does not necessarily make them privileged[1]. Each situation must be assessed on its own facts, taking into consideration the purpose of the internal communications between an in-house counsel and the other parties to the conversation.

It must be borne in mind that preserving professional secrecy is not only an ethical duty[2], but a fundamental right protected by Quebec's *Charter of Human Rights and Freedoms*[3] as well as the *Canadian Charter of Rights and Freedoms*[4].

That being said, not all communications involving a lawyer are necessarily privileged, as mentioned above. The right to assert solicitor-client privilege requires that the communication be on a confidential basis and for the purpose of obtaining legal advice. Only in such circumstances will the client be immune from unauthorized disclosure of the communication to third parties in connection with legal proceedings[5]. The protection is for the benefit of, and can only be waived by, the client[6].

In this regard the case law stipulates that each case is *sui generis*, and the Court must first of all determine if the circumstances may give rise to the existence of the privilege[7]. For the purposes of that analysis, the legal context must be taken into account in determining whether the lawyer's opinion was actually being sought from the latter in his or her capacity as a lawyer[8]. Thus, for example, advice given by a lawyer on a purely administrative matter will most likely not be protected by solicitor-client privilege[9].

PRIVILEGED EMAILS CIRCULATED WITHIN THE ORGANIZATION

In-house counsels essentially have one sole client, i.e. their employer. Nowadays, within business enterprises, in-house counsels' communications with their employer are routinely done by email, often with several recepients at once. When those recipients are

key persons within the organization, there is a strong likelihood that the privilege will apply. This becomes less certain however, when the number of recipients is much greater or where their role within the organization is less strategic.

And then there are emails that were originally protected by solicitor-client privilege, but are subsequently shared with individuals who are neither key employees nor lawyers for the organization, or communications involving in-house counsel that are part of an email chain of which the content is predominantly not privileged. While such situations frequently arise, to date there is very little case law dealing with them.

That being said, despite the scant jurisprudence on the extent to which the privilege applies to email exchanges between in-house counsel and other employees within the organization, the principles identified in case law involving the sharing of other types of written communications are still relevant and can be used as analytical guidelines.

For example, courts in Canada have held that where a legal opinion protected by solicitor-client privilege is sent by in-house counsel to a representative of the business enterprise who subsequently shares it with another representative, the privilege remains intact[10]. This principle was also applied in Ontario by the Tax Court, in the context of an exchange of emails[11].

In 2013, the Superior Court of Quebec heard a case where a privileged communication intended for a director in connection with a lawsuit against a co-director ended up, unbeknownst to its intended recipient, in the possession of the opposing party who promptly forwarded it to his lawyer. This situation was due to the corporation's IT system, which automatically transferred emails within the organization regardless of who the intended recipient was[12]. After determining that the email in question was covered by solicitor-client privilege, the Court ordered it removed from the court record and prevented the plaintiff from making any use of it[13].

PRIVILEGED EMAILS SHARED WITH THIRD PARTIES

What principles apply when a privileged email is forwarded to third parties (e.g. external accountants, engineers, public relations firms, business partners, etc.)? Is it still covered by solicitor-client privilege, or does the adage "a shared secret is no longer a secret" apply?[14]

"...every professional in Quebec is bound by an obligation of confidentiality"

In this regard, it is important to bear in mind that every professional in Quebec is bound by an obligation of confidentiality[15], although the degree and extent of such obligation may vary depending on the role of the members of the various professional orders and the nature of the services they perform[16]. It should also be noted that Quebec's tax legislation gives much more weight to the professional secrecy incumbent on lawyers and notaries than to that incumbent on members of other professional orders[17]. Under such legislation, apart from documents protected by the solicitor-client privilege of lawyers and notaries, the tax authorities are free to examine documents from all other professional orders[18]. It thus becomes important to be mindful of all the other parties who may be involved when dealing with communications between lawyers and their clients.

In addition, in light of the case law[19], it is important to take the context of the disclosure into consideration and specifically whether or not the disclosure was voluntary, as it may have an impact on whether communications are privileged or not.

Finally, it must be understood that the presence of a third party during a meeting between a lawyer and the client does not necessarily entail waiver of the privilege. For example, in the *Foster Wheeler* case[20], the Supreme Court of Canada held that the mere presence of a facilitator hired to chair a meeting did not entail a waiver of solicitor-client privilege, as the meeting was held with a view to maintaining its confidentiality, and the facilitator was performing

a function necessary for its effective operation. The Court decided that the facilitator's presence did not entail a waiver of the privilege, as the meeting was held *in camera* with an expectation of confidentiality[21].

However, the analysis becomes decidedly more difficult where an email exchange between lawyers and their clients includes a third-party recipient. It is then far from certain that the Supreme Court's analysis in *Foster Wheeler* can be transposed to such situations.

It is accordingly essential to consider the circumstances of each case in order to determine the extent of the privilege attached to a communication between lawyers and their clients.

A recent decision of the Court of Québec[22] sitting in judicial review of a decision of the Access to Information Commission on the value of services rendered in connection with a dismissed class action, seems to indicate that in the case of the performance of a one-off professional service, the party claiming that the information is confidential has the burden of proving it. Straightforward summary evidence will then suffice to establish the confidential nature of the information as well as the right to immunity from having to disclose it. Thus, the party claiming the privilege in such circumstances has the burden of establishing it. On the other hand, in the case of a complex mandate performed over a lengthy period, this decision would seem to suggest that the burden of proof will be reversed in order not to unduly undermine solicitor-client privilege. The communications would then be presumed to be privileged, and the party seeking to obtain the information contained in it would have the burden of rebutting that presumption. To our knowledge, this is an isolated decision in presenting the applicable burden of proof in such a way. And while we are not convinced that the rules as explained in this decision will be applied in future cases, this judgment nevertheless underscores the importance of closely analyzing the circumstances of each case rather than blindly applying the principles that are generally applicable to solicitor-client issues.

PRIVILEGED EMAILS SHARED IN CONNECTION WITH A JOINT PROJECT

Another situation that can give rise to some difficulty occurs where two or more parties having a common interest come to share privileged information in connection with a joint project or mandate. It is often the case that written agreements providing specifically for the sharing of privileged information in connection with, for example, a transaction between two entities with common interests, eventually lead to much more informal and less controlled exchanges between the parties to the transaction and their respective counsel. The existence of what is known as the "common-interest privilege" may then have to be determined.

The common-interest privilege is a ground for defending against an allegation that the privilege attaching to documents or information has been waived. In order to determine whether privileged information or documents remain protected because of this exception based on the common interest of the parties, several questions must be answered and a series of criteria considered. Specifically, there must first of all have been the intent to retain the privileged status of the information or document despite the sharing thereof[23]. Then, the nature of the relationship between the parties, the result or goal sought by them, the degree of common interest they share, and the facts specific to the situation at hand must all be taken into consideration[24]. It is thus clear that determining the existence of a common interest is far from being straightforward, particularly where there are no formal indicia confirming the parties' intention in that regard.

For example, in the *Kalogerakis* case referred to hereinabove[25], a party wanted to know the amount of legal fees incurred by several school boards in defending against a class action. In that case, a single lawyer represented all of the school boards and his fees were shared among them. A table had been created internally to keep track of the payments, showing the amount of the fees billed without any information regarding the nature of the services rendered. Sitting in judicial review of a decision of the Access to Information Commission, the Court of

Québec indicated that a statement of professional fees is *prima facie* covered by the solicitor-client privilege, because it generally contains a description of the services rendered and often a summary of the advice provided. The Court added however that this reasoning does not apply where the document or information sought pertains solely to the amount of the fees, as was the case with the table prepared by the school boards. Consequently, the Court ordered that the fee amounts shown on the table be disclosed to the other party.

By the same token, if two parties agree to retain the same lawyer in connection with a shared goal, the ensuing tripartite relationship will inevitably lead to the exchange of privileged information by the two clients with their shared counsel. In the event that the latter is in a situation where some of the privileged information obtained in the course of a mandate must be disclosed, both clients must waive their right to the solicitor-client privilege. This is often referred to as a joint waiver of the solicitor-client privilege[26].

SOME RECOMMENDATIONS

All of these problematic situations, which are essentially legal in nature, raise "organizational" type issues. For in the case of emails, they can be found not only in the outbox of the sender, but also on the organization's server, in the inbox of each of the recipients, on their respective servers, potentially in the "paper" files of each participant in the email chain, and possibly even in their virtual file directory. Moreover, in practice many of these individuals routinely forward emails to their assistant for printing and filing, such that they can also be found in the assistant's inbox and in the latter's space on the server. And once the emails are printed and filed, if one or more of these individuals erase a sent or received email, a copy of it will then be found on the "deleted items" file in the email software or somewhere on their respective servers. On a more technical note, even items that are "re-deleted" from the "deleted items" file can still be found in the "empty" spaces of servers.

"...if the organization has not put in place internal measures to protect privileged information and documents, it may encounter certain difficulties..."

In light of the foregoing, it is apparent that copies of a document covered by solicitor-client privilege can potentially be found in many locations, some of which will be beyond the control of the participants in the initially privileged exchange, hence the heightened difficulty in protecting them.

Consider now the situation where the computerized files of an organization become the target of a search and seizure or Anton Piller order: if the organization has not put in place internal measures to protect privileged information and documents, it may encounter certain difficulties in trying to protect them after the fact. For the evidence sought by the seizing party is often comingled with the other electronic records of the organization, including documents covered by solicitor-client privilege. During such seizures, the methodology recommended by IT experts is to make a "bit to bit" mirror copy of the computerized files subject to seizure and to assure the parties that the entirety of the data has not been altered. Ultimately, it is often several millions of documents that will initially be seized and then searched, using key words, in order to identify (1) documents covered by solicitor-client privilege that must be protected, and (2) documents containing evidence relevant to the proceedings. This is a delicate and painstaking exercise which in most cases requires the active assistance of an IT specialist.

While there is no perfect method for protecting solicitor-client privilege in such contexts, some preventive measures can nonetheless be put in place to minimize the likelihood of involuntary waiver of the privilege.

For example:

1. in the subject heading of the email, specify that it is privileged, if it is the case (N.B.: automatic signatures indicating that the

email is confidential and can only be used by the intended recipient are no longer sufficient);

2. ensure that only the individuals covered by the solicitor-client relationship receive a privileged email;
3. avoid long email chains which may contain not privileged information;
4. file privileged emails in folders and files which are clearly identified as privileged & confidential;
5. in some cases, it may also be prudent to file privileged documents in an electronic space which is password secured;
6. if a privileged email is printed, it should be filed in a folder identified as privileged & confidential and not lumped in with general correspondence; and
7. ensure that all correspondents or others incidentally involved take similar measures and are aware of the purpose of such measures.

While solicitor-client privilege is protected by the Charters, and professional secrecy is an ethical obligation of lawyers and notaries, the preponderant use of electronic communications by businesses and their internal legal departments means that, in practice, protecting solicitor-client privilege is not as straightforward as it may appear to be.

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NOTES ET SOURCES

[1] *Robinson* v. *Weinberg*, 2005 CanLII 35800 (QC CS), paras 27 to 32 [*Robinson*].
[2] *Code of ethics of advocates,* CQLR c. B-1, r 3, ss. 3.06.01.01 to 3.06.01.05, 3.06.01 and 3.06.03; *Act respecting the Barreau du Québec*, CQLR c. B-1, s. 131; and *Professional Code*, CQLR c. C-26, s. 60.4.
[3] CQLR c. C-12, s. 9.
[4] *The Constitution Act, 1982, being Schedule B to the Canada Act (UK), 1982, c. 11 (Canadian Charter of Rights and Freedoms)* s.7, for a recent example, see *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7.
[5] *Foster Wheeler Power Co.* v. *Société intermunicipale de gestion et d'élimination des déchets (SIGED)*, [2004] 1 S.C.R. 456 [*Foster Wheeler*].
[6] *R.* v. *McClure*, [2001] 1 S.C.R. 445, para 37; *Lavallée*, infra note 8, paras 24 and 39; see also *Chambre des notaires*, infra note 8.
[7] *Kalogerakis* v. *Commission scolaire des Patriotes*, 2014 QCCQ 4167, par. 175 [*Kalogerakis*].
[8] *Cinar Corporation* v. *Weinberg*, J.E. 2007-1912 (S.C.), para 8; *Robinson*, paras 27 to 32; *Samson Indian Band* v. *Canada*, [1995] 2 F.C. 769 (C.A.); *Descôteaux* v. *Mierzwinski*, [1982] 1 R.C.S. 860; *Lavallée, Rackel & Heintz,* [2002] 3 S.C.R. 209 [*Lavallée*]; *Pritchard* v. *Ontario (Human Rights Commission),* [2004] 1 S.C.R. 809; *Solosky* v. *R.,* [1980] 1 S.C.R. 821; *Maranda* v. *Richer*, [2003] 3 S.C.R. 193; *Québec (Sous-ministre du Revenu)* v. *Legault*, [1989] R.J.Q. 229 (C.A.); *R.* v. *Campbell*, [1997] 1 S.C.R. 565 [*Campbell*]; *Chambre des notaires du Québec* v. *Canada (Procureur général),* 2010 QCCS 4215; *Canada (Procureur général)* v. *Chambre des notaires du Québec*, 2014 QCCA 552 [*Chambre des notaires*]. See also Mahmud Jamal and Sylvain Lussier, *Le secret professionnel de l'avocat; ce que tout avocat doit savoir selon la Cour suprême du Canada*, Barreau du Québec, Développements récents en déontologie, droit professionnel et disciplinaire, Cowansville, Yvon Blais, 2008, pp. 203 to 205.
[9] *Robinson*, supra note 1, para 29; *Campbell*, supra note 8, p. 602, para 50.
[10] See in this regard *Global Cash Access (Canada) Inc. v. The Queen*, 2010 TCC 493 (Ontario); see also *Gardner* v. *Viridis Energy Inc.*, 2014 BCSC 204, para 35; *Imperial Tobacco Canada Ltd.* v. *Canada*, 2013 CCI 144, paras 56 and 57 [*Imperial Tobacco*]; and *506913 N.B. Ltd.* v. *Canada*, 2012 TTC 2010, paras 29 to 34.
[11] *506913 NB Ltd* v. *The Queen*, 2012 CCI 210; see also *Imperial Tobacco*, supra note 10.
[12] *Picard* v. *Picard*, EYB 2013-229542.
[13] *Ibid*., paras 72 and 73.
[14] *Robinson*, supra note 1, para 34.
[15] *Foster Wheeler*, supra note 5, para 35; see also *Frenette* v. *Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 [*Frenette*]; *St-Georges* v. *Québec (Procureur général)*, J.E. 88-336; *Amyot et fils Ltée* v. *Jacqueline Lauzon*, (1993) AZ-93021232 (S.C.); and *Chambre des notaires*, supra note 8, paras 64 et seq.
[16] *Frenette*, supra note 15, pp. 673 to 675; *Foster Wheeler*, supra note 5, para 35.
[17] *Tax Administration Act*, RSQ c A-6.002, ss. 46 to 53.1.
[18] *Foster Wheeler*, supra note 5, para 35; According to section 46 of the *Tax Administration Act*, only a lawyer or notary may object to the examination or seizure under that statute of a document in his or her possession if he or she considers that the examination or seizure would be a breach or professional secrecy.
[19] See for instance *Canada (Minister of Revenue – M.N.R.)* v. *Thornton*, [2013] 1 C.T.C. 165.
[20] *Foster Wheeler*, supra note 5, paras 48 to 50.
[21] Regarding the impact of the presence of a third party on waiver of the privilege, see also *Gatti* v. *Barbosa Rodrigues*, 2011 QCCS 4771 (appeal dismissed 2011 QCCA 1786) where the presence at the meeting of a childhood friend and business partner was not deemed to have been a waiver, and see also *Pfeiffer et Pfeiffer Inc.* v. *Javicoli*, [1994] RJQ 1, 1993 CanLII 4326 (CA) [*Pfeiffer*] where it was decided that the presence of a trustee-in-bankruptcy during an exchange between a lawyer and the latter's client was deemed to have been a waiver of the privilege.
[22] *Kalogerakis*, supra note 7, paras 133, 134 and 175.
[23] *3312402 Canada Inc.* v. *Accounts Payable Chexs Inc*., 2005 CanLII 31360 (QCCS); *Scott & Associates Engineering Ltd.* v. *Ghost Pine Windfarm*, LP [2011] A.J. No 574.
[24] *Pitney Bowes of Canada Ltd.* v. *Canada*, 2003 CFPI 214; *Buttes Gas and Oil* v. *Hammer (No 3)*, [1980] 3 All ER 475; *General Accident Assurance Company* v. *Chrusz*, (1999) 45 O.R. (3d) 321; *Fraser Milner Casgrain LLP* v. *Canada (Minister of National Revenue)*, 2002 BCSC 1344; *Re YBM Magnex International Inc*., 1999 ABQB 793; *Supercom of California* v. *Sovereign General Insurance Co*., [1998] O.J. No 711; *Pritchard* v. *Ontario (H.R.C.)*, [2004] 1 S.C.R. 810; *Bergeron* v. *Jung*, J.E. 2001-138 (S.C.); *Ziegler Estate* v. *Green Acres (Pine Lake) Ltd*., 2008 ABQB 552; *Hospitality Corp. of Manitoba Inc.* v. *American Home Assurance Co.*, (2002) M.J. No 479.
[25] *Kalogerakis*, supra note 7.
[26] See *Pfieffer*, supra note 21 and *R.* v. *Dunbar*, (1982) 138 DLR (3d) 221, 68 CCC (2d) 13, (CA Ont.).